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## TRANSCRIPT OF RECORD

# Supreme Court of the United States

**OCTOBER TERM, 1945**

## No. 61

OKLAHOMA PRESS PUBLISHING COMPANY,
PETITIONER,

*vs.*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STACTES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

**PETITION FOR CERTIORARI FILED APRIL 16, 1945.**

**CERTIORARI GRANTED MAY 21, 1945.**

# United States Circuit Court of Appeals

## TENTH CIRCUIT.

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No. 3036.

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OKLAHOMA PRESS PUBLISHING COMPANY,
a Corporation, APPELLANT,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR EASTERN DISTRICT OF OKLAHOMA

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FILED JULY 19, 1944.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 3036.

OKLAHOMA PRESS PUBLISHING COMPANY, a Corporation, APPELLANT,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, APPELLEE.

## Statement of Points on Which Appellant Intends to Rely.

1. The trial court was without jurisdiction to enter any order in this cause.

2. The Administrator had no jurisdiction over Appellant's affairs.

3. The attempted application of the Act to the business of Appellant violates its rights as guaranteed by the First Amendment to the Constitution of the United States.

4. The attempted application of the provisions of Section 11(a) and (c) of the Act to Appellant's business is without authority, under the Act, and violates Appellant's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

5. The attempted application of the provisions of Section 11(a) and (c) of the Act to Appellant's business also violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

6. By reason of the provisions of Section 13(a) (8) of the Act, the attempted application of any of the provisions of the Act with respect to wages or hours of employees of Appellant violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

7. By reason of the provisions of Section 15(a) (1), (2) and (5), and those of Section 16(a) and (b), the Order requested by the Administrator, if granted, would violate the rights of Appellant as guaranteed by the Fifth Amendment to the Constitution of the United States.

8. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to employees of Appellant engaged in bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesmen, because the provisions of Section 13(a) (1) of the Act exempt such employees from the provisions of Sections 6 and 7 of the Act.

9. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to Appellant, because of the provisions of Section 13(a) (2) of the Act.

10. Appellee's application filed in the trial court was insufficient upon which to base any order against Appellant.

11. Under the undisputed evidence and admissions, the trial court erred in entering its order against Appellant, and in failing to dismiss the application of the Appellee.

12. Under the admissions and undisputed evidence, the Act has no application to the newspaper publishing business of Appellant.

13. The trial court erred in its Conclusion of Law number I.

14. The trial court erred in its Conclusion of Law number II.

15. The trial court erred in its Conclusion of Law number III.

16. The trial court erred in entering its final order of June 12, 1944.

ELISHA HANSON,
JOSEPH C. STONE,
CHAS. A. MOON,
Attorneys for Appellant.

## Certificate of Service.

I, Chas. A. Moon, attorney for Appellant herein, hereby certify that on this 17th day of July, 1944, I mailed a true and correct copy of the foregoing Designation of Points on which Appellant Intends to Rely, to each of the following named attorneys of record for Appellee, at their respective addresses, to-wit:

To—Douglas B. Maggs, Solicitor, Office of the Solicitor, U. S. Department of Labor, Washington, D. C.

Archibald Cox, Associate Solicitor, Office of the Solicitor, U. S. Department of Labor, Washington, D. C.

Llewellyn B. Duke, Regional Attorney, U. S. Department of Labor, Rio Grande National Bldg., Dallas, Texas.

Harry Campbell, Jr., Associate Attorney, U. S. Department of Labor, Rio Grande National Bldg., Dallas, Texas.

CHAS. A. MOON.

Filed July 19, 1944. Robert B. Cartwright, Clerk.

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## Stipulation to be Included as Part of Appeal Record to be Printed.

It is hereby stipulated and agreed by and between the parties in the above styled cause that the following admissions made in open court on March 9, 1944 by Appellant herein be included as part of the Appeal Record to be Printed:

We send complimentary to some of the service men boys and men in the United States Army service outside of this state and in foreign countries complimentary copies of the paper. We state in the affidavit the number. My recollection is 123 of the Phoenix and 17 Times-Democrat, and for those we make no charge against anyone and we receive no compensation of any kind from anyone. In addition to that we publish, of course, foreign advertising and after our publications are made we send daily I think it is 36 copies of

the Phoenix an approximate average daily 36 Phoenix and 31 Times-Democrat, to our representatives in other states who in turn deliver them to these foreign advertisers. Of course, the daily mailing of those papers fluctuates in number but the approximate average daily number is 36 and 31, and for those we make no charge and receive no compensation from anyone.

Dated this 2nd day of August, 1944.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Appellant, Oklahoma Press Publishing Company, a corporation.
DOUGLAS B. MAGGS, Solicitor,
BESSIE MARGOLIN, Assistant Solicitor,
LLEWELLYN B. DUKE, Regional Attorney,
Attorneys for Appellee, L. Metcalfe Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor.

Filed August 5, 1944. Robert B. Cartwright, Clerk.

# IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE EUGENE RICE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

In the Matter of the Application of

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor for an order requiring the production of documentary evidence by the OKLAHOMA PRESS PUBLISHING COMPANY, a corporation, pursuant to subpoena.

No. 1166-Civil.

## Application to Compel the Production of Documents and Records.

To the United States District Court for the Eastern District of Oklahoma:

2 The petitioner, L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress, 52 Stat. 1060, U. S. C., Title 29, Sec. 201, et seq.), hereinafter referred to as the Act, respectfully shows and alleges that:

1. The petitioner, L. Metcalfe Walling, herein referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator or his designated representatives are empowered by virtue of Section 11(a) of the Act to
3 investigate, enter, and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of Section 9 of the

Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 26, 1914, as amended, U. S. C., Title 15, Sections 49 and 50 (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Administrator, and the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records, and papers relating to any matter under investigation;

2. Jurisdiction to issue the order hereinafter prayed for is conferred upon this Court by virtue of Section 9 of the Federal Trade Commission Act (made applicable by Section 9 of the Fair Labor Standards Act as aforesaid) which empowers any of the District Courts of the United States within the jurisdiction of which an investigation is carried on, in case of a refusal to obey a subpoena to any corporation or other person, to issue an order requiring such corporation or other person to produce the books, documents, records, and papers designated in the subpoena. The investigation, in the course of which the subpoenas duces tecum were issued by the Administrator and served, as hereinafter set forth, is being conducted in the Eastern District of Oklahoma within the jurisdiction of this Court;

3. At all times hereinafter referred to, the Oklahoma Press Publishing Company of Muskogee, Oklahoma, hereinafter designated as the company, was and is a corporation organized and existing under and by virtue of the
4 laws of the State of Oklahoma, having its principal office and place of business located in Muskogee, Oklahoma, within the jurisdiction of this Court;

4. On information and belief, Franklin E. Katterjohn is the business manager of the company;

5. On information and belief, at all times hereinafter referred to, the company has been engaged in its said place of business in interstate commerce and in the production of goods for interstate commerce in that it publishes two daily newspapers known as the Muskogee Daily Phoenix (morning) and the Muskogee Times-Democrat (evening), and receives and sends daily news, intelligence, and com-

munications in interstate commerce, and transports, ships and delivers goods produced by it from points within the State of Oklahoma to points without the State of Oklahoma;

6. The Administrator having reasonable grounds to believe that the company in its business as above described at its said place of business in Muskogee, Oklahoma, has been and was, violating the provisions of Sections 6, 7, 11(c) [and the regulations pursuant thereto (known as Part 516, as amended, Title 29, Chapter V, Code of Federal Regulations, Part 516), a copy of which, together with the amendments, is attached hereto, marked Exhibit "A" and made a part hereof], 15(a)(1), 15(a)(2), and 15(a)(5) of the Act; and deeming investigation necessary and appropriate to determine whether the company has violated any provisions of the Act, and deeming an investigation necessary and appropriate as aiding in the enforcement of the provisions of the Act, Erle P. Bryan, a designated representative of the Administrator, entered said place of business for the purpose of making an investigation as provided in Section 11(a) of the Act;

7. The company refused to allow and permit the said Erle P. Bryan to make any inspection of its said records or to make any transcriptions thereof, and otherwise hindered him in his said investigation as is more fully set forth in the affidavit of the said Erle P. Bryan attached hereto, marked Exhibit "B" and made a part hereof;

8. Thereafter a subpoena duces tecum was issued by the said Administrator under the powers conferred upon him by Section 9 of the Act, requiring the company to appear before Ernest M. Worley, an officer of the Wage and Hour Division, at Room 231, United States Post Office Building, in the City of Muskogee, Oklahoma, on the 17th day of November, 1943, at 10:00 A. M. to produce specific books, papers, documents and records of the company, and the said *subpena* was served upon the company by delivering a duplicate original copy of the said *subpena* duces tecum to Franklin E. Katterjohn, business manager of the company, on November 3, 1943, at the office of the company in Muskogee, Oklahoma. A copy of the said *subpena* duces tecum,

with the return endorsed thereon, is attached hereto, marked Exhibit "C" and made a part hereof;

9. At all times herein stated, on information and belief, the aforesaid Franklin E. Katterjohn, business manager above mentioned, is and was in charge of the company's said place of business and has, and has had, custody and control of the books, records, and documents described in the said *subpena* duces tecum.

10. At 10:00 A. M. on the 17th day of November, 1943, the said Ernest M. Worley, an officer of the Wage and Hour Division, as provided in said *subpena,* was present at Room 231 in said United States Post Office Building in Muskogee, Oklahoma, for the purpose of examining the books, records, papers and documents, the production of which was required by the said *subpena,* but the said Franklin E. Katterjohn and the company failed, neglected and refused to appear at the said time and place before the said officer or to produce the said books, records, documents and papers, as is more fully set forth in the affidavit of the said Ernest M. Worley, attached hereto and marked Exhibit "D";

6 11. All of the books, records, papers, and documents required to be produced by the *subpena* duces tecum were at the time of the issuance of said *subpena* duces tecum, and are now, relative, material, and appropriate to determine whether the company has violated Sections 6, 7, 11(c), 15(a)(1), 15(a)(2), and 15(a)(5) of the Act, and will aid in the enforcement of the provisions of the Act;

12. The books, records, papers and documents required to be produced by the said *subpena* duces tecum were at the time of the issuance and service of said *subpena,* and are now, in the possession, custody, and control of the company;

13. The petitioner respectfully appeals to this Honorable Court for an order directing the Oklahoma Press Publishing Company of Muskogee, Oklahoma, to appear before him or the said authorized representative and to produce the books, records, documents and papers as requested by the said *subpena* duces tecum, as set forth above at a time and place to be fixed in said order.

Wherefore, petitioner respectfully prays:

(a) That an order be issued forthwith directing the said Oklahoma Press Publishing Company of Muskogee, Oklahoma, to appear and show cause upon a day certain to be fixed by the said order why an order should not issue requiring said company to produce the books, records, documents and papers required by the *subpena* duces tecum before the petitioner, or one or more of his authorized representatives, at such time and place as this Court may order;

(b) That upon the return of the order directing the Oklahoma Press Publishing Company at Muskogee, Oklahoma, to appear and show cause as above set forth,
7 an order issue requiring said company to produce the books, records, documents and papers required by said *subpenas* duces tecum before the petitioner, or one or more of his authorized representatives at such time and place as this Court may order;

(c) That the petitioner have such other and further relief as may be necessary or appropriate.

DOUGLAS B. MAGGS, Solicitor;
ARCHIBALD COX, Associate Solicitor;
LLEWELLYN B. DUKE, Regional Attorney;
HARRY CAMPBELL, JR., Associate Attorney, United States Department of Labor,
Attorneys for Administrator.

(Duly verified by Harry Campbell, Jr.)

Filed Jan. 29, 1944. John H. Pugh, Clerk, U. S. District Court.

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Exhibit B.

State of Arkansas, County of Logan, ss.

25 Erle P. Bryan, of lawful age, being first duly sworn, on oath says:

That he is an Inspector of the Wage and Hour Division, United States Department of Labor, and is an authorized representative of L. Metcalfe Walling, Administrator of

the Wage and Hour Division, United States Department of Labor, and is authorized to investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to this Act, and to enter and inspect such places and such records (and make such transcriptions thereof), question such employees and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provisions of the Fair Labor Standards Act of 1938 or which may aid in the enforcement of the provisions of the said Act;

That he, accompanied by Inspector-in-Charge John C. Wilson, went to the office of the Oklahoma Press Publishing Company, the publisher of the Muskogee Daily Phoenix and of the Muskogee Times Democrat, in Muskogee, Oklahoma, on June 3, 1943 and requested the production of the books, records, documents and papers as are set forth in the subpoena duces tecum attached to the Application for an Order to Compel the Production of Documents and Records. That he contacted Mr. Franklin E. Katterjohn, the business manager of the Oklahoma Press Publishing Company and was advised by Mr. Katterjohn that no decision as to whether the books and records might be shown to him and to Inspector-in-Charge Wilson could be reached until the return of Mr. Tams Bixby Jr., the President of the Oklahoma Press Publishing Company on June 4;

26 On June 4, 1943, he and Mr. Wilson returned to the office of the Oklahoma Press Publishing Company and requested of Mr. Bixby and Mr. Katterjohn the production of the books, records, documents and papers material to the making of an investigation of the operations of the company. That the said Mr. Tams Bixby, Jr. and Mr. Franklin E. Katterjohn refused access to such books, records, documents and papers to Mr. Wilson and to this affiant.

Further deponent saith not.

ERLE P. BRYAN.

Subscribed and sworn to before me this 27th day of January, 1944. Ruth Lyman, Circuit Clerk. (Seal).

Exhibit C.

United States of America
Department of Labor
Wage and Hour Division

Subpoena Duces Tecum

To Oklahoma Press Publishing Company, 214 Wall Street, Muskogee, Oklahoma.

27 At the instance of the Administrator, Wage and Hour Division, Department of Labor, you are hereby required to appear before Ernest M. Worley of the Wage and Hour Division, Department of Labor, at Room 231, United States Post Office Building in the City of Muskogee, Oklahoma on the 17th day of November 1943, at 10:00 o'clock A. M. of that day, to testify In the Matter of Oklahoma Press Publishing Company involving an investigation pursuant to the provisions of Sections 9 and 11(c) of the Fair Labor Standards Act of 1938 regarding complaints of violations by said compay of Sections 6, 7, 11(c), 15(a) (1), 15(a) (2) and 15(a) (5) of the Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods.

Fail Not At Your Peril.

In Testimony Whereof, the seal of the Department of Labor, is affixed hereto, and the Administrator of the Wage and Hour Division, of said Department of Labor, has hereunto set his hand at New York this 14 Day of October, 1943.

(Seal) L. METCALFE WALLING.

Return of Service.

I hereby certify that a duplicate original of the within *subpena* was duly served in person Mr. Franklin E. Katterjohn, Business Manager, 214 Wall St., Muskogee, Okla., Time 11:43 A. M. on the person named herein on November 3, 1943.

JOHN C. WILSON,
Senior Inspector-in-Charge.

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Exhibit D.

State of Oklahoma, County of Oklahoma ss.

28 Ernest M. Worley, of lawful age, being first duly sworn, on oath says:

That he is an officer of the Wage and Hour Division, United States Department of Labor, and is in charge of the Field Office of said Division located in room 1004 Petroleum Building, Oklahoma City, Oklahoma;

That he is the same Ernest M. Worley named in the subpoena duces tecum served upon the Oklahoma Press Publishing Company, of Muskogee, Oklahoma, on November 3, 1943, and directing that the said Oklahoma Press Publishing Company appear before this deponent at room 231 U. S. Post Office Building, Muskogee, Oklahoma, at 10:00 a. m. on November 17, 1943 and produce the books, records, *ducments* and papers specified in said subpoena:

That he was present in room 231 U. S. Post Office Building, Muskogee Oklahoma on the said 17th day of November, 1943 at 10:00 a. m. as specified in said subpoena, being there present at that time for the purpose of receiving, examining and making transcriptions of books, records, documents and papers required by the said subpoena from the said Oklahoma Press Publishing Company;

That he awaited the appearance of the company or its representatives for the production of said books, records, documents and papers, as required by the aforesaid subpoena duces tecum by the said company or its representatives and the said company and its representatives failed,

neglected and refused to appear in answer to the said subpoena and did fail, neglect and refuse to produce the books, records, papers and documents specified in the aforesaid subpoena duces tecum;

That thereafter he received a letter addressed to him by the said Oklahoma Press Publishing Company, a copy of which is attached hereto, advising that the said Oklahoma Press Publishing Company would not appear as required by the said subpoena for the reasons set out in the said letter.

29 Further deponent saith not.

ERNEST M. WORLEY.

Subscribed and sworn to before me this 20th day of January, 1944. Dorothy Warren, Notary Public. (Seal)

---

Tams Bixby, Jr.,
President & Treasurer
Tams Bixby, III
Vice President
Lee Diwine
Secretary

Franklin E. Katterjohn
Business Manager
Paul A. Bruner
Managing Editor

Oklahoma Press Publishing Company
Muskogee, Oklahoma

Nov. 15, 1943

Mr. *Earnest* M. Worley, Room 231, U. S. Post Office Building, Muskogee, Oklahoma.

30 Dear Sir: The Oklahoma Press Publishing Company has been served with *Subpena* Duces Tecum to appear before you, at Room 231, U. S. Post Office Building, in the City of Muskogee, Oklahoma, on November 17, 1943, at 10:00 o'clock A. M., and bring its records, books, etc., for inspection at that time.

You are hereby respectfully advised that the Company will fail to appear at the time and place designated, for the reason that it has been advised by counsel that the law under which the subpoena was issued and the appearance required does not apply to the Oklahoma Press Publishing Company, which is the owner and publishers of the two Muskogee daily newspapers.

It is not our intention to violate any law, and in fact, although we have been advised that the law under which the subpoena was issued does not apply to newspaper publishers, we have attempted in good faith to conduct our business in accordance with the rules and regulations issued under the law in the interest of good employer-employee relations.

For your information, you are advised that we do not have any out-of-state subscribers for our newspapers, and that we have had no such out-of-state subscribers since the first day of June, 1939.

You, of course, understand that in failing to appear, under advice of counsel, we mean no disrespect to you personally, nor to the law.

Very truly yours,

FRANKLIN E. KATTERJOHN,
Business Manager.

FEK:H

---

Order to Show Cause.

31 Upon application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, filed herein on the 29th day of January, 1944, duly verified by Harry Campbell, Jr., upon the 28th day of January, 1944, it is hereby

Ordered by the Court that the respondent, the Oklahoma Press Publishing Company, a corporation, owner and publisher of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, of Muskogee, Oklahoma, on the 18th day of February, 1944, at 10:00 A. M. of that day, or as soon thereafter as counsel can be heard, why an order should not issue requiring the respondent, the Oklahoma Press Publishing Company, a corporation, to appear before L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division, designated by him at such time and place as this Court may order and to produce the following books, papers and documents:

All books, papers and documents showing the hours

worked by, and wages paid to, each of the employees of the said Oklahoma Press Publishing Company engaged in the publication and distribution of the Muskogee Daily Phoenix and the Muskogee Times-Democrat between October 24, 1938, and the date hereof, including all pay roll ledgers, time sheets, time cards and time clock records, and all books, papers and documents showing the distribution
32 of copies of the said Muskogee Daily Phoenix and the Muskogee Times-Democrat outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods.

It Is Further Ordered that the service of a copy of this order to show cause, together with a copy of the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, be made upon the respondent on or about the 2nd day of February, 1944, and that such service be deemed sufficient service.

Dated this 29th day of January, 1944.

EUGENE RICE,
United States District Judge.

Filed January 29, 1944. John H. Pugh, Clerk, U. S. District Court.

U. S. Marshal's Return.

Received this writ at Muskogee, Okla. on Jan. 29, 1944 and on Jan. 31 1944 in Muskogee, Okla. I served a true and correct copy of Order to Show cause and Petition, on the Oklahoma Press Publishing Co. by serving Franklin E. Katterjohn, General Manager of said Oklahoma Press Publishing Co.

GRANVILLE T. NORRIS, U. S. Marshal.
By: JOHN D. REID, Deputy.

Filed February 2, 1944. John H. Pugh, Clerk, U. S. District Court.

Return to Order to Show Cause and Response to Application to Compel the Production of Documents and Records.

33 The Respondent, Oklahoma Press Publishing Company, a corporation, in response to the Order to Show Cause entered by this Honorable Court on January 29, 1944, upon the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, now appears and makes its return to said Order to show Cause

"why an order should not issue requiring the respondent, the Oklahoma Press Publishing Company, a corporation, to appear before L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division, designated by him at such time and place as this Court may order, and to produce the following books, papers and documents:

All books, papers and documents showing the hours worked by, and wages paid to, each of the employees of the said Oklahoma Press Publishing Company engaged in the publication and distribution of the Muskogee Daily Phoenix and the Muskogee Times-Democrat between October 24, 1938, and the date hereof, including all pay roll ledgers, time sheets, time cards and time clock records, and all books, papers and documents *shwoing* the distribution of copies of the said Muskogee Daily Phoenix and the Muskogee Times-Democrat outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods",

as follows, to-wit:

34 1. This Court is without jurisdiction in the premises.

2. The Administrator is without jurisdiction over Respondent's affairs.

3. The attempted application of the Act to the business of this Respondent violates its rights as guaranteed by the First Amendment to the Constitution of the United States.

4. The attempted application of the provisions of Section 11(a) and (c) of the Act to this Respondent is without authority under the Act, and violates Respondent's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

5. The attempted application of the provisions of Section 11(a) and (c) of the Act to the Respondent also violates Respondent's rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

6. By reason of the provisions of Section 13 (a) (8) of the Act, the attempted application of any of the provisions of the Act with respect to wages or hours of employees of this Respondent, violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

7. By reason of the provisions of Section 15(a) (1), (2) and (5), and those of Section 16(a) and (b), the order requested by the Administrator, if granted, would violate the rights of this Respondent as guaranteed by the Fifth Amendment of the Constitution of the United States.

8. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to employees of this Respondent engaged in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman, because of the provisions of Section 13(a) (1) of the Act exempting such employees from the provisions of Sections 6 and 7 of the Act.

9. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to this Respondent because of the provisions of Section 13(a) (2) of the Act.

Further responding, and in particular in answer to the application of the Administrator, respondent

1. Admits on information and belief that L. Metcalfe Walling, therein referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor; denies that Section 11(a) of the Act empowers the Administrator or his designated rep-

resentatives to investigate, enter and inspect places and records (and make such transcriptions thereof) of employment, in any industry, as he may deem necessary or proper to determine whether any person has violated any provision of the Act; denies that by virtue of Section 9 of the Act the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended, U.S.C., Title 15, Sec. 49 and 50 (relating to the attendance of witnesses and the production of books, papers and documents) are made applicable to the jurisdiction, powers and duties of the Administrator in the manner alleged by petitioner; and denies that the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records and papers relating to any matter under investigation.

Further answering the allegations in paragraph 1, Respondent respectfully shows that under the precise provisions of Section 11(a) of the Act no general authority is given to the Administrator or his designated representatives to enter for purposes of inspection any establishment, unless that establishment be "in any industry subject to this Act"; that there has been no final determination that the newspaper publishing business as such is an industry subject to the Act; that the newspaper publishing business is not an industry subject to this Act, as is more fully shown in the affidavit of Kenneth E. Olson, Dean of the Medill School of Journalism, Northwestern University, marked Exhibit "A", attached hereto and asked to
36 be read as a part hereof; that this Respondent is not an industry subject to the Act, as is more fully shown in the two affidavits of Paul J. Schaefer, marked Exhibits "C" and "D", attached hereto and asked to be read as a part hereof; that the Administrator has assumed and asserted authority not even purported to be given to him by the Act, to enter and inspect all places of business in the United States, including newspaper publishing plants, without any prior formal determination as to whether the Act applies to such, and in the absence of complaint, and without reference to any charge of violation of law, as is more fully set out in the affidavit of Elisha Hanson, marked Exhibit "B", attached hereto and asked to be read

as a part hereof; that the purported subpoena duces tecum issued herein alleges that an investigation is being made of complaints of violation by respondent of certain sections of the Act, whereas nowhere, either in the application of the Administrator or in the affidavit of Erle P. Bryan attached thereto, is there any allegation that complaints of violation by respondent have been made in fact or upon information and belief.

2. Denies each and every allegation in paragraph 2. Further answering the allegations of said paragraph 2, Respondent respectfully shows (a) that the investigation alleged to have been conducted was not conducted in accordance with the precise provisions of Section 11(a) of the Act; (b) that the Administrator is without jurisdiction over Respondent's business; and (c) that this Court is without jurisdiction.

3. Admits that Respondent is a corporation organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business at Muskogee, Oklahoma; denies that it is within the jurisdiction of this Court in or for this proceeding.

37 4. Denies that Franklin E. Katterjohn is the business manager of respondent corporation, but admits that he is the business manager of the two daily newspapers referred to herein.

5. Admits that Respondent is engaged in the business of publishing two daily newspapers, to-wit, the Muskogee Daily Phoenix and the Muskogee Times-Democrat, but denies each and every other allegation in said paragraph 5.

Further answering the allegations of said paragraph 5, Respondent respectfully shows that it is engaged in the business of disseminating important public information in the printed form, said information being in the nature of news, editorial comment, and advertising matter, which when gathered together by Respondent is published by it in its newspapers aforesaid, which are published as follows: the Muskogee Daily Phoenix each morning, and the Muskogee Times-Democrat each evening except Sundays. That the function of a daily newspaper is not to produce goods for

commerce, but to serve its community through the dissemination of information in the printed form, as is more fully described in the affidavit of Kenneth E. Olson, marked Exhibit "A", attached hereto and asked to be read as a part hereof.

That since June 1, 1939, none of Respondent's circulation in either of said newspapers has been sent or distributed outside the State of Oklahoma, except that approximately 120 copies of the Muskogee Daily Phoenix and approximately 17 copies of the Muskogee Times-Democrat during the past two years have been mailed daily to former Muskogee residents and citizens who are serving in the armed forces of the United States, both in this country and abroad, for which papers so mailed no charge is made and no compensation of any character is received, and except that Respondent has mailed daily to its out of state representative copies of the papers for its foreign advertisers, for which papers so mailed no charge is made and no compensation is received. That in rare instances copies of said papers are mailed direct to foreign advertisers upon their request, but no compensation is charged or received for such copies; all of which is more fully described in the two affidavits of Paul J. Schaefer, marked Exhibits "C" and "D", attached hereto as a part hereof and asked to be read as a part hereof.

38 6. Denies each and every allegation of paragraph

6. Further answering the allegations of said paragraph 6, Respondent denies that the provisions of Sections 6, 7, 11(c), and 15(a) (1), (2) and (5) of the Act apply either to its employees or to Respondent itself; denies that Erle P. Bryan had any authority under Section 11(a) of the Act to enter its plant for the purpose of making an inspection.

Still answering the allegations of said paragraph 6, Respondent respectfully shows that on June 3rd and 4th, 1943, one Erle P. Bryan appeared at respondent's office, represented himself to be a duly authorized representative of the Administrator, and sought to make an investigation of Respondent's business; that Respondent, on advice of counsel, refused to permit said purported representative

to inspect its books and records, on the ground that its business is not subject to the provisions of the Act, and that its employees are not subject to the provisions of the Act, and that its employees are not engaged in activities covered by the Act; that Respondent therefore refused to permit said purported representative to examine records pertaining to hours worked by or compensation received by its employees; that Respondent informed said purported representative that it would not produce for inspection records of any kind, for the reasons herein stated and upon advice of counsel.

Further answering the allegations in paragraph 6, Respondent respectfully submits on information and belief that the attempt to inspect its business was made by said Erle P. Bryan in the carrying out of a program laid down by the Administrator and his predecessors for an inspection of all business and industry in the United States, in the absence of any complaint against any particular business or industrial establishment and without reference to any charge of *ciolation* of law, and in the absence of any such charge of violation of law, and without any prior determination as to the applicability of the provisions of the
39 Act to such business and industries, as is more particularly described in the affidavit of Elisha Hanson, marked Exhibit "B", attached hereto and asked to be read as a part hereof.

7. Respondent admits that it refused to allow and permit an inspection of its records, and states that its refusal to permit such inspection was for the reasons herein set forth.

8. Respondent denies that the subpoena duces tecum referred to in paragraph 8 of the Application was issued by the Administrator under the powers conferred upon him by Section 9 of the Act. Respondent admits that on November 3, 1943, a copy of petitioner's Exhibit "C" was delivered to Franklin E. Katterjohn, but in this connection Respondent denies that Franklin E. Katterjohn is now or was at any time the business manager or a stockholder, director or officer of the respondent corporation, nor is he nor has he ever been a managing or general agent, or an agent authorized by appointment or by law to receive service

of process for or on behalf of said respondent corporation. That on said date he was only the business manager of the two newspapers herein mentioned, and never at any time has he had any other connection with said respondent corporation.

Further answering the allegations of said paragraph 8, Respondent objects to the description of the alleged subpoena, and prays reference to the subpoena itself, and denies that the alleged subpoena purported to call for the production of specific books, papers, documents or records. Respondent denies that the said alleged subpoena duces tecum correctly describes Respondent's books, papers, documents and records.

9. Respondent denies that Franklin E. Katterjohn has or ever had control of the books, records and documents described in said subpoena duces tecum, with authority to permit their inspection, and alleges that the said Katterjohn advised the said Erle P. Bryan that he, Katterjohn, had no authority to permit an inspection of the records of said newspapers before receiving the consent of the President of the corporation, which consent he has never received.

10. Respondent is without knowledge as to the whereabouts of Ernest M. Worley as alleged in paragraph 10 of the application, at the time alleged; admits that it did not appear before him at the time and place alleged; denies that there was any legal requirement for it to appear then or at any other time, in compliance with the command of the alleged subpoena duces tecum; denies that the alleged subpoena duces tecum is a valid subpoena duces tecum; denies that it was served upon Respondent in the manner and form required by law, and alleges that said subpoena duces tecum was not delivered to or served upon any officer, director, stockholder, general manager, or managing or general agent of respondent corporation, or an agent authorized by appointment or by law to receive service or process for or on behalf of said respondent corporation. That at all times since March 17, 1941, Franklin E. Katterjohn has been and now is only the business manager of the two newspapers herein mentioned, and he is not and never has been connected with said respondent corporation in any other ca-

pacity. On belief Respondent alleges that said subpoena duces tecum, together with numerous other subpoenas of like nature, was signed L. Metcalfe Walling, in blank, and that the name of the Respondent and all other typewritten matters in said printed subpoena were inserted by other parties unknown to Respondent, after the signing thereof by the said L. Metcalfe Walling.

11. Respondent denies each and every allegation of paragraph 11. Further answering the allegations of said paragraph 11 of the Application, respondent respectfully submits that the Administrator is without authority under the Act to conduct a general "fishing expedition" in-
41 to Respondent's business, to determine whether Respondent has violated Sections 6, 7, 11(c), 15(a) (1), 15(a) (2), and 15(a) (5) of the Act. Respondent further denies the applicability of said provisions of the Act to its business, or to its employees, and respectfully submits that the Administrator is without any jurisdiction whatsoever over its business.

12. Respondent denies that the alleged subpoena duces tecum required this Respondent to produce any books, records, papers, documents or memoranda whatsoever; admits that all of Respondent's books, records, papers, documents and memoranda are in the possession, custody and control of the Respondent.

Finally, Respondent denies the authority of this Court to issue any order requiring the production of books, papers, records or documents whatsoever, in compliance with the alleged subpoena duces tecum herein referred to.

Respondent states that all of its news received from outside the State of Oklahoma and printed in its papers is received over telegraphic wires running into the building of Respondent where said newspapers are printed, and that said wires are connected with automatic teletype machines which receive and automatically record in type similar to that of a typewriter, the news so delivered to it over said telegraphic wires. That no person in the employ of Respondent is required to operate said teletype machines.

Respondent further states that after said out of state news is received as aforesaid, it is sorted out, and only

such portions thereof as Respondent's employees deem proper are edited and published in its newspapers aforesaid, none of which papers are sent to subscribers, distributors or dealers outside the State of Oklahoma.

42 Respondent further states that its out of state advertisements are received through the United States mail from its out of state advertising representative and its out of state advertisers. That a large portion of said out of state advertising is received in the form of mats and electrotype plates. That the cost for all out of state advertisements is paid to Respondent by its said out of state representative, less commissions. As to whether or not said out of state representative collects for all of such advertisements this Respondent has no knowledge or concern.

The affidavit of Paul A. Bruner, marked Exhibit "E", is attached hereto and made a part hereof, and is asked to be read as a part hereof. The affidavit of Franklin E. Katterjohn, marked Exhibit "F". is attached hereto and made a part hereof, and is asked to be read as a part hereof.

Respondent further states that in the publication and distribution of its newspapers aforesaid it is not engaged in interstate commerce, and that its said employees are not engaged in interstate commerce, or in the production of goods for interstate commerce.

Wherefore, Respondent respectfully prays:

(1) That the Order entered herein on January 29, 1944, requiring Respondent to appear before this Honorable Court to Show Cause, etc., hereinbefore referred to, be vacated, and

(2) That this proceeding be dismissed.

JOSEPH C. STONE.
CHAS. A. MOON,
Attorneys for Respondent.

State of Oklahoma, Muskogee County, ss.

43 Tams Bixby, Jr., being first duly sworn, upon oath states that he is the President of the Oklahoma Press Publishing Company, a corporation, Respondent in the above entitled cause, and that he has been the President of said corporation since the 16th day of January, 1941.

Affiant further states that he has read the foregoing Response and knows the contents thereof; that the statements and allegations therein made are true and are known to affiant of his personal knowledge; that the statements and allegations therein made upon information and belief are by this affiant believed to be true; that the statements and allegations therein denied are untrue, and that the statements and allegations therein denied upon information and belief are by this affiant believed to be untrue; that the conclusions of law therein stated are upon information and advice of counsel, and are by this affiant believed to be true.

TAMS BIXBY, JR.

Subscribed and Sworn to before me this 4th day of March, 1944. La Mona Blair, Notary Public. My commission expires: April 5, 1947. (Seal).

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Exhibit A.

Affidavit of Kenneth E. Olson.

State of Illinois, County of Cook, ss.

44 Kenneth E. Olson, being duly sworn, deposes and says:

I reside at 789 Vernon Avenue, Glencoe, Illinois. I am, and have been since 1937, Dean of the Medill School of Journalism Northwestern University, Evanston, Illinois. I am a graduate of Northland College, A.B., and of the School of Journalism, University of Wisconsin, A.M. and M.A. in journalism. After my service in France with the American Expeditionary Forces I was a student for some time at the University of Bordeaux.

I have had many years experience in the field of journalism. While attending high school at Prentice, Wisconsin, I worked as a handy man on a weekly newspaper, setting type, operating a linotype machine, and doing some reporting.

Prior to the World War I worked as a reporter and later as City Editor for the Ashland (Wis.) Press and then as a reporter on the Duluth Tribune and the Milwaukee Senti-

nel. On my return from overseas I joined the staff of the Milwaukee Journal where I was successively copy reader, night editor, telegraph editor, make-up editor, assistant Sunday editor and promotion editor. In 1923 I became managing editor of the Capital Times, Madison, Wisconsin.

45 From 1924 to 1930, I was engaged in the advertising field first as new business and advertising manager of the Commercial National Bank and Union Trust Company at Madison and later for four years as the head of my own advertising agency, which handled the accounts for some forty banks, trust companies, investment houses and insurance firms.

From 1932 to 1935, I was associated with the Northwest Daily Press Association handling market research and analyses and national advertising promotion. During this period I was an editorial contributor to the Minneapolis Star.

From 1935 to 1937, I was manager of the New Jersey Press Association. I began part time lecturing at the University of Wisconsin, School of Journalism, while in Madison and was an Assistant Professor there from 1926 to 1930.

I was a Professor of Journalism at the University of Minnesota from 1930 to 1935.

As manager of the New Jersey Press Association, I was also Director of the Department of Journalism at Rutgers University.

I am familiar with the business of publishing newspapers in the United States, with the interests and problems of newspapers, whether published on a one, two, three, five, six or seven day a week basis. Newspapers are published on all those bases and any newspaper with five or more issues a week is known as a daily newspaper. Daily newspapers in turn are known as either morning or evening newspapers. Some newspapers have both morning and evening issues. A number of newspapers are published on Sunday only. Custom has designated them as Sunday
46 newspapers, whereas newspapers published on one week day only are known as weekly newspapers.

Semi-weekly and tri-weekly newspapers are just what their names indicate, i.e., publications issued twice or three times a week as the case may be.

Whatever a newspaper may be, weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of information in the printed form. The information in turn is divided into three classes: news, editor comment and advertising.

The newspaper publishing business is essentially a local business. More than 90 per cent of the total circulation of all daily newspapers and more than 85 per cent of the total circulation of all Sunday papers is distributed within the state of publication. Weekly, semi-weekly and tri-weekly newspapers have an even greater proportion of wholly intrastate circulation.

Throughout its entire history the business of the press has been one of service. It serves its readers by bringing to them that information in the form of news that the editor regards as sufficiently important to justify its publication; information in the nature of comment on matters of importance; and information concerning the goods, services or ideas of others who pay for the service of its dissemination in the form of newspaper advertising.

Newspaper advertising falls chiefly into four classes known in the business as local display, general or national display, classified and legal. Classified and legal advertising are almost wholly local in character and local advertising accounts for more than 85 per cent of the total volume of newspaper advertising.

447 Newspapers have but two sources of revenue from the service they render. One is circulation revenue, derived from the sale of their publication, and the other is advertising revenue, derived from the charge made to advertisers for printing, publishing and disseminating information concerning their business or interests.

For more than 100 years it has been the almost universal custom of daily and Sunday newspapers to sell their publi-

cations for less than the cost of publication. They must depend upon revenues from the service they render their advertisers to meet the greater portion of the costs of their news and editorial service to their readers. No newspaper in modern times has continued publication for any appreciable period of time on circulation revenue alone.

This practice of selling newspapers at less than their cost of publication has made possible the distribution of newspapers to all elements of our population. It has made possible an informed electorate which our founding fathers envisioned when they entrusted newspapers with the task of keeping citizens informed of the news of their government. Were subscribers to pay for their newspapers on the basis of cost of publication newspaper subscriptions would be very limited. The quantity and quality of public information would be correspondingly limited.

Newspapers employ staffs of highly skilled professional persons to gather, write and edit their news; to solicit, prepare, and lay out advertising copy; and to comment upon matters of general public importance.

According to the Census of Manufactures for 1937 they had the largest number of high salaried employees and the highest paid wage earners of any group engaged in business or industry in the United States.

Instruction in journalism is offered in 545 four-year colleges and universities. With the addition of junior colleges the number is over 700. There are thirty-three professional schools of journalism, whose prerequisite requirements are comparable to those of law schools and schools of medicine. These schools are recognized throughout the educational and business fields as professional schools.

48 As of the beginning of this year there were more than 13,000 newspapers published in the United States, of which approximately 1,800 were daily or daily and Sunday newspapers and the remainder weekly, semi-weekly, or tri-weekly newspapers. These newspapers employ thousands of persons in executive, administrative and professional capacities and as outside salesmen.

Daily newspapers vary greatly in circulation, ranging from less than 1,000 copies daily to more than 1,500,000

copies. Of the 2,044 daily newspapers published in the United States as of December 31, 1939, 437 had circulations under 3,000 copies daily; 466 between 3,000 and 5,000 daily; 473 between 5,000 and 10,000 daily; 350 between 10,000 and 25,000 daily; and 156 between 25,000 and 50,000 daily; and 78 between 50,000 and 100,000 daily. Only 84 out of 2,044 daily newspapers had circulations in excess of 100,000 daily, and of these only 19 had circulations in excess of 250,000 daily.

Newspapers are essentially and predominantly local in the nature of their service. With few exceptions, all of them have by far the greatest portion of their total aggregate circulation distributed within the trading area of the villages, towns or cities in which they are published. Very few newspapers have any appreciable amount of circulation beyond 100 miles from the place of publication. Thousands of newspapers circulate in far smaller radii, except in respect of a few mail subscriptions which go mainly to former residents of the localities in which they are published. More than 90 per cent of the daily newspapers published in the United States distribute in excess of 98 per cent of their circulation entirely within the state of publication.

Daily, weekly, semi-weekly and tri-weekly newspapers are competitive with one another in those areas where any two or more of them are published. They are competitive in every form of their service. Each tries best to serve its readers with news and editorial comment on subjects
49 of interest to them. Each tries best to serve advertisers, not only in the publication of their advertising but in the manner of counselling as to preparation of copy and pictures used therein and in the correlation of merchandising plans with the advertising appeal.

While every newspaper has regular schedules for the publication of each of its various editions, no newspaper, if properly it is to serve its readers, can adhere strictly to these in times of flood, disaster, war, political campaigns or other conditions of great news importance. The people want news when it is news, not at some other time, and if a newspaper is to serve them it must be prepared to meet their demands.

Likewise in the purely intellectual field of gathering, writing and editing the news it is impossible for a newspaper to adhere to rigid time schedules. It cannot, for instance, ask a City Council or a state legislature or Congress to hold a session and dispose of matters to meet its convenience. It can neither schedule committee meetings of such legislative bodies nor regulate the time consumed therein. The breaks of the news are beyond a newspaper's control, yet it must at all times be prepared to meet such breaks. The work of those engaged in gathering, writing or editing news, in soliciting, or preparing copy for advertising cannot be standardized in relation to a given period of time. A reporter may spend several days on a single story or he may do several stories in a single day. A copy reader may spend an hour or more on a single involved story and in the next hour handle a dozen shorter stories. A telegraph editor may spend hours putting together the dispatches from the war zone, making changes in leads as new news comes in between editions. A reporter assigned to a political cleanup may spend days or weeks gathering his information before he writes a single line. A hurricane strikes New England and the New England newspapers must rush men into the field to gather the news in the wake of its destruction. An airplane is wrecked or a train goes through a bridge or fails to round a curve and the newspapers must get the news and the pictures which are a part of the news for their readers. Over the time of such incidents a newspaper has no control. Its operations must be flexible enough for it to handle them.

Any act which imposes a penalty upon a newspaper in its efforts to serve its readers, such as a right requirement as to maximum hour week, in my opinion, would serve seriously to restrict the service of the press in the carrying on of its business of gathering and disseminating information.

The definitions of professional, executive and administrative employees and outside salesmen promulgated by the Administrator, known as Regulations Part 541—Sections 541.1 to 541.6—if applied to the newspaper publishing business, will cause irreparable injury to more than 1,000 daily newspapers in this country.

By reason of the very nature of these definitions execu-

tives on hundreds of small newspapers who now solicit and prepare advertising, direct circulation, write editorials and perform other services will either be barred from performing those services or entitled to receive time and one-half overtime in excess of 40 hours in any one week. Nearly all of these small daily newspapers operate on a six day basis in villages, towns and cities where there is a limited supply of journeymen mechanics and limited revenue for newspaper publication. Any increased burden on these newspapers will have to be met either through added revenues or by curtailment of service, and, in my opinion, from my knowledge of the field, they will have to be met through curtailment of service which curtailment will undoubtedly force many of them to reduce their publishing operations from a six day a week to a five day a week basis and others to suspend publication altogether.

51 It has been a long established custom on these small newspapers that the foremen in their mechanical departments work at the same tasks as the journeymen working under their direction as many hours in any one week as a journeyman works at straight time rates and perform their executive duties in addition. Under the new definitions a working foreman is limited to eight hours of work similar to that performed by a journeyman working under his direction. If he exceeds eight hours in any one day then under the terms of the Administrator's order he is no longer an executive and his employer is obligated to pay him overtime.

These regulations also fix a minimum of $200 a month for both administrators and professional employees of newspapers. Failing the establishment of such a minimum, all persons employed in a professional capacity, whether their salaries be lower or higher than $200 per month, must be paid overtime for work in excess of forty hours in any one week. There is no difference in the professional nature of the work performed by an editor, a managing editor, a city editor, a news editor, a sports editor, a society editor, a copy reader, a rewrite man, a reporter, an advertising solicitor, an advertising writer, or an advertising layout man who draws more than $200 per month, and that performed by one who draws less than $200 per month.

More than 1,300 daily newspapers in the United States have circulations of less than 10,000 copies per day and more than 400 newspapers have circulations of less than 3,000 copies per day. The requirements in these definitions of persons intended by Congress to be exempt from the minimum wage and maximum hour provisions of the Act place an impossible burden on hundreds of daily
52 newspapers. To meet that burden they will either have to curtail their service to their readers or obtain additional revenues elsewhere, failing which many of them will be forced out of business. In my opinion, hundreds of newspapers will be unable to find additional revenues adequate to meet this increased cost. They will either have to curtail their service or suspend publication altogether.

This affidavit is made for use in the above entitled case.

K. E. Olson.

Subscribed and Sworn to before me this 2nd day of February, 1944. Rita Lambert, Notary Public. My commission expires: March 13, 1945. (Seal).

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Exhibit B.

Affidavit of Elisha Hanson.

City of Washington, District of Columbia, ss.

53 Elisha Hanson, being duly sworn, upon his oath states and deposes that he is an attorney at law with offices at 729 Fifteenth Street, Northwest, Washington, D. C. That he is admitted to practice in the courts of the District of Columbia, the State of Maryland, and before the Supreme Court of the United States. That he is now and for some years past has been general counsel of the American Newspaper Publishers Association which embraces within its membership the publishers of more than 425 daily and/or Sunday newspapers. That, as a part of his duties as general counsel for said Association, he has had to advise members of said Association as to their rights, obligations and duties under various statutes enacted by the Congress of the United States as well as by state legis-

latures as those statutes affect or interfere with or restrict the business of the press; that in the light of said duties affiant, since the date of the enactment of the Fair Labor Standards Act, has attempted in every proper manner to inform himself as to the policies of administration of that Act insofar as such policies may affect publishers of daily and/or Sunday newspapers in the United States.

54 Affiant further deposes and says upon information and belief, that there has been no formal determination by any of the persons who have served as Administrators of the Wage and Hour Division since the enactment of the Act as to the applicability of the provision of Section 11 (a) of said Act to the daily newspaper publishing business as an "industry subject to this Act". And, upon information and belief, that instead of making such a formal determination prior to conducting investigations into various businesses and industries in the United States, the present Administrator of the Act is engaged upon an investigation of all forms of business and industry in the United States in an effort to determine whether the hours worked by their employees exceed the hours designated in Section 7 of the Act, whether the wages paid to their employees exceed the minimum wages designated in Section 6 of the Act, and whether said business and industries are paying overtime to their employees or have paid overtime to their employees in accordance with the formula laid down in Section 7 of the Act, since the effective date of the Act, and all of this without any prior formal determination as to whether the Act applies to such business or industry or any particular establishment thereof prior to said investigation.

Affiant further deposes and says that Administrators of the Fair Labor Standards Act, in various public statements and official news releases have asserted the power to make nation-wide inspections of all businesses and industries to be followed up by routine inspections of all businesses and industries, in the absence of complaint and without reference to any charge of violation of law and in the absence of any such charge of violation of law.

Affiant further deposes and says, upon information and

belief, that on January 23, 1940, Philip B. Fleming, then Administrator of the Wage and Hour Act, addressed
55 the Southern States Industrial Council at Atlanta, Georgia, and in the course of his address said:

"We shall not wait until a complaint has been made against a plant before we look into it, but will visit it as a matter of routine at periodic intervals. That will assure employers of general compliance, and eliminate the possibility of competitive inequities that result when a few find it possible to ignore a law with which their business rivals are forced to comply":

that said remarks are contained in a news release issued by the Wage and Hour Division, United States Department of Labor under date of January 23, 1940, identified as R-600.

Affiant further deposes and says, upon information and belief, that on April 1, 1940, the Wage and Hour Division, United States Department of Labor, issued press release R-700, wherein Philip B. Fleming, then Administrator of the Act, was quoted as saying:

"We have inspected an establishment only on a complaint, as we have many complaints awaiting attention. From now on, we are not going to await complaints in order to protect establishments in compliance; that is, paying no one less than 30 cents an hour and paying at least time and a half the worker's regular rate for overtime.

"All regional directors have been instructed to this effect. This is another step toward routine inspection of all establishments governed by this Act."

Affiant further deposes and says, upon information and belief, that on or about March 1, 1940, said Philip B. Fleming made another statement of similar import, as follows:

"I believe that the only kind of enforcement which will not result in severe competitive disadvantage to those employers who are complying is regular routine enforcement by regular routine inspection of all the establishments whose employees are determined to be covered.

"Where such enforcement and inspection reveals viola-

tions of the Act on the part of employers which are not wilful and malicious, it is my intention to give such employers an opportunity to comply and to make amends to the employees in respect to whose wages and hours the violation was ascertained, etc."

56 and that said statement was reported in the Wage and Hour Reporter under date of March 11, 1940.

Affiant further deposes and says that in the said Wage and Hour Reporter of June 17, 1940, said Administrator Fleming, in discussing his inspection of lumber mills, stated that the drive was not primarily a punitive campaign, but that it was his policy to work an entire industry over to see if there have been any violations of the law in that industry.

Affiant further deposes and says, upon information and belief, that in certain daily newspapers of May 21, 1940, there appeared quotations from a speech made by the said Administrator, Philip B. Fleming, before the Controllers Institute of America, wherein he said:

"If we have any reason to suspect that one hoop-skirt factory is violating the law, we not only check up on it, but we immediately move into every other hoop-skirt factory. By that method we are able to make good our promise to the employer that if he complies, his competitors also will be made to comply."

Affiant further deposes and says, upon information and belief, that on August 24, 1940, the then Administrator, said Philip B. Fleming, ordered a nation-wide drive for compliance with the Wage and Hour Law in five manufacturing industries—furniture, leather goods and luggage, boots and shoes, hosiery and woolen goods; that information concerning such order was contained in an Associated Press Dispatch dated, Washington, August 24. That said Associated Press, inter alia, quoted said Administrator, Philip B. Fleming, as stating that in his opinion a majority of the factories to be inspected "as in most of the other industries of the country", were complying with the law and further that the objective of the drive was to bring the minority "into line".

Affiant further deposes and says, upon information and belief, that on August 25, 1940, the Nashville Tennesseean, a daily and Sunday newspaper published at *Nasville,*
57 Tennessee, quoted William M. Eaves, Regional Director of the Wage and Hour Division, as announcing a drive to check and enforce compliance with the Wage and Hour Law in five industries in Tennessee and Kentucky to begin on August 26 and that said article in said Nashville Tennessean further credited said Regional Director with stating that inspectors making the original drive on these five industries would demand proper record keeping "in order that the way will be paved for quick routine inspections in the future".

Affiant further deposes and says upon information and belief that on September 5, 1940, Frank J. G. Dorsey, Regional Director of the Wage and Hour Administration whose offices are 1216 Widener Building, Philadelphia, Pennsylvania, sent a news release to the daily newspapers published in Easton, Pennsylvania, for use in their editions of September 6, 1940, wherein said Dorsey said:

"Establishments of five important industries in Easton, Northampton County, and in nearby parts of the state will be inspected at once for compliance with the Federal Wage-Hour Law, Regional Director Frank J. G. Dorsey announced at his office in Philadelphia. The inspections are part of a nation-wide drive by which all establishments covered by the law will be inspected, industry by industry.

"A group of eight inspectors arrived here today to take over the work in this district. The industries that will be inspected here as part of concentrated simultaneous inspection throughout the country are: Furniture, Leather Goods and Luggage, Boots and Shoes, Hosiery and Woolen Goods.

"This is a step in a drive to obtain compliance with the Fair Labor Standards Act on a national industry-wide basis, Mr. Dorsey stated. It follows a compliance drive in the lumber industry, now approaching a successful conclusion.

"The object of the drive, Mr. Dorsey explained, is to benefit both employers and employees throughout a given

industry, by protecting an establishment that is in compliance from the lower-cost competition of one which is not observing the wage and hour requirements, and by gaining for workers the wages and overtime to which they are entitled under the Act.

* * * * *

58 "A majority of the factories in these and in the other industries in the country are complying with the Fair Labor Standards Act or have shown a willingness to do so as soon as inadvertent violations are pointed out, Mr. Dorsey stated. The drives are not punitive, nor does the inspection of a given industry mean that it is more of a violator than others. The inspectors on this job will emphasize its educational aspects. They will first locate violations and then by explaining to the non-complying employer the requirements and purposes of the Act and its benefits to both employers and employees, attempt to bring him into voluntary compliance. Legal action will be taken only if necessary."

Affiant further deposes and says that these routine inspections are in violation of law and in defiance of Congressional policy; that Congress has twice expressed emphatic disapproval of the inspection policy of the Wage and Hour Division.

The 77th Congress during its first session reduced the budget of the Wage and Hour Division for the fiscal year 1942 by eliminating an item of $350,000 requested for inspection purposes. In its report to the House, the House Appropriations Committee said:

"As a matter of policy, the committee is unable to find any justification for placing the inspection on a basis of inspecting each and every plant that might be covered by the act. There are many enforcement statutes of all kinds being administered by various agencies of the Government. If the Government were to adopt a policy of inspecting every unit of production or every individual that might be covered by these acts, the cost would be staggering and all out of proportion to the benefits to be obtained thereby."

The Senate reinstated the item in the bill. The measure

then went to conference. The House unanimously instructed its conferees to insist upon the elimination of the item. This they did and the Senate yielded. In asking for instructions, Representative Tarver, Chairman of the House Sub-Committee, said:

"We have moved here that the House insist upon its disagreement to the Senate amendments. We repeat the statement which was made in the presentation of the bill originally that if the House feels that this wholesale investigation of the plant of every employer in the United States should be made, then you ought to vote down the motion which is now being offered."

59 Notwithstanding the express condemnation of his routine investigations by Congress, affiant deposes and says, upon information and belief, that Administrator Fleming announced that he intended to continue them in an address before the Mississippi State Federation of Labor at Meridian on July 14, 1941.

Affiant further deposes and says that the Wage and Hour Division continued its routine investigations despite the disapproval of Congress, as is demonstrated by the report of the House Appropriations Committee in reducing by the sum of $250,700 the budget of the Wage and Hour Division for the fiscal year 1943 The report condemns the Division for its failure to follow the wishes of the Committee and Congress in the matter of routine inspections.

Nevertheless, the present Administrator, who defended the Division's methods of investigation before the House Appropriations Committee, has not, to affiant's knowledge, adopted any policy of investigation other than that followed by his predecessors as hereinbefore described, and continues to assert the power to enter and inspect any individual establishment without reference to any charge of violation of law.

Affiant further deposes and says that there are at the moment more than seventy agencies in Washington which in one form or another exert a regulatory control over the daily affairs of life or compete with those engaged in business; that the demands which the regulatory agencies make upon business are beyond comprehension; that in 1938, for

instance, it was estimated that business concerns in this country were called upon to make more than 135,000,000 reports on more than 4,700 report forms; that the burden has since incresed many fold; that only a few weeks ago the head of the War Production Board became so concerned over the waste of time in war plants required for the filling
60 out of these forms that he ordered a study to be made to bring about their simplification; that it has been estimated that in the machine tool industry alone more than 25,000 man hours per week are now required to answer the questionnaires of the Government concerning the activities in that industry; that it is estimated that at the present time there are 35 different Government wartime questionnaires sent to this one industry alone; and that 18 different monthly reports are required of it, four quarterly reports, and one annual report and in addition a report must be made out on every order received as well as a report to accompany every purchase order for materials.

Affiant further deposes and says that the Wage and Hour Division sends report forms to employers with the demand that they be filled out, among them Form AD-85, in which employers are asked to inform the Division whether violations of law have occurred and to agree to make restitution to employees under the Division's supervision; in addition, on information and belief, that officials of the Wage and Hour Division visit employees at their homes to gather information on their hours of labor and rates of pay and solicit complaints of violation of law through confidential questionnaires sent to employees, copies of which will not be made available for perusal by employers.

Affiant further deposes and says that numerous newspaper publishers, including respondent in the above entitled case, have consulted him in respect of the legality of the Administrators' demands for inspection of their books, papers, records, etc., as a part of their general campaign of inspection of all businesses and industries in the United States, in the absence of complaint or charge of violation of the law, in an effort to compel universal compliance with the terms of the Fair Labor Standards Act; that affiant has
61 advised said publishers that in his opinion no such Administrator had or has authority, expressed or im-

plied, to carry on a fishing expedition into the books, papers and records of any newspaper publisher in the hope of turning up a violation of this Act or any other law. Said advice was based in part on affiant's belief that an attempt to apply the Fair Labor Standards Act to daily newspaper publishers genrally would violate their rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States; that the daily newspaper publishing business is not such a business as can be regulated by Congress; and further that the assertion of the power to make general inquiry into the conduct of said business for the purpose of determining whether or not it is complying with the Fair Labor Standards Act violates the rights of publishers as guaranteed by the Fourth Amendment to the Constitution of the United States; that a similar general inquiry when attempted by another agency of the Federal Government in respect of another type of business met with a proper condemnation by the Supreme Court of the United States in the notable decision of Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.

Affiant further deposes and says that where complaints are filed with the Administrator, those complained against are kept in ignorance as to the nature of the complaint, as well as the identity of the complainant; that based upon this policy of secrecy, the Administrator has issued an invitation to "competitors and public spirited citizens as well as employees" to complain against those engaged in business and industry, and has stated in respect of such complaints that "All information, including the identity of the complainant, will be held confidential", which invitation and which statement can be found at Page 118 of the Wage and Hour Manual, 1941 Edition, published by the Bureau of National Affairs, Inc., Washington, D. C.

62 This affidavit is made for use in the above entitled case.

ELISHA HANSON.

Subscribed and Sworn To before me, a Notary Public, this 2nd day of February, 1944. Lelitia Armstead, Notary Public, D. C. (Seal)

## Exhibit C.

### Affidavit of Paul J. Schaefer.

State of Oklahoma, County of Muskogee, ss

63 Paul J. Schaefer, being duly sworn, deposes and says:

I am a resident of the County of Muskogee and State of Oklahoma. For a period of 17 years last past I have been continuously and am now, Circulation Manager of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, the two newspapers published at Muskogee, Oklahoma, by the Oklahoma Press Publishing Company, a corporation organized under the laws of the State of Oklahoma.

During said period I have been and am now thoroughly familiar with the circulation department of said newspapers and the operation of this department, and with the circulation and distribution of said newspapers. For the twelve months ending September 30, 1942, as audited by the Audit Bureau of Circulations, the entire total net paid circulation of the Muskogee Daily Phoenix was 11,447 copies, and the entire total net paid circulation of the Muskogee Times-Democrat was 8,991 copies.

64 During this same said twelve months period a daily average total of 7,847 copies of the Muskogee Daily Phoenix, and 6,127 copies of the Muskogee Times-Democrat were distributed entirely within the County of Muskogee in the State of Oklahoma, in the cities, towns and villages all within the County of Muskogee, as follows:

| Towns | Muskogee Daily Phoenix | Muskogee Times-Democrat |
|---|---|---|
| Boynton | 137 | 82 |
| Braggs | 72 | 65 |
| Camp Gruber | 178 | 284 |
| Council Hill | 69 | 28 |
| Ft. Gibson | 106 | 20 |
| Haskell | 256 | 124 |
| Keefeton | 7 | 24 |
| Muskogee, City | 6,266 | 5,026 |
| Muskogee, R.F.D. | 337 | 39 |
| Oktaha | 89 | 66 |
| Porum | 94 | 108 |
| Taft | 22 | 44 |
| Wainwright | 23 | 1 |
| Warner | 54 | 78 |
| Webbers Falls | 123 | 92 |
| Balance in County (no Township) | 14 | 46 |
| Total | 7,847 | 6,127 |

The breakdown of figures listed above is for the publication date of September 22, 1942, which was the date selected by the Audit Bureu of Circulations as being a typical average day and there would be but a slight variation of this figure over a year period.

That since June 1, 1939, none of Respondent's circulation in either of said newspapers has been sent or distributed outside the State of Oklahoma, except that approximately 120 copies of the Muskogee Daily Phoenix and approximately 17 copies of the Muskogee Times-Democrat during the past two yers have been mailed daily to former Muskogee residents and citizens who are serving in the armed forces of the United States, both in this country and abroad, for which papers so mailed no charge is made and no compensation of any character is received, and except that Respondent has mailed daily to its out of state representative copies of the papers for its foreign advertisers, for which papers so mailed no charge is made and no compensation is

received. That in rare instances copies of said papers
65 are mailed direct to foreign advertisers upon their request, but no compensation is charged or received for such copies.

The following is a list of several weekly newspapers published in the immediate distribution area of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, which are competitive with our two newspapers, together with, upon information and belief, the circulation of said weekly newspapers, which I have been able to ascertain. No circulation figures are published by the said newspapers and I have been able to procure only the circulation of those newspapers opposite whose names the figures appear:

| Name of Paper | Circulation |
|---|---|
| Boynton Index | 522 |
| Eufaula Indian Journal | 1,131 |
| Ft. Gibson Independent | 650 |
| Haskell News | 1,000 |
| Henryetta Free-Lance | 2,963 |
| Sallisaw County Times | 1,626 |
| Stigler News-Sentinel | 1,395 |
| Stilwell Democrat-Journal | 1,900 |
| Tahlequah Citizen | 990 |
| Wagoner-Record-Democrat | 1,640 |

Besides the foregoing circulation figures, according to the Audit Bureau of Circulations statement for twelve months ending December 31, 1942, the Tulsa World has a paid circulation of a total of 817 copies per day, and the Tulsa Tribune has a paid circulation of 458 copies per day in the City of Muskogee.

Likewise, for the twelve months ending September 30, 1942, The Daily Oklahoman, published in Oklahoma City, has a paid circulation of 210 copies per day, and the Oklahoma City Times, published in Oklahoma City, has a paid circulation of 126 copies per day in the City of Muskogee.

There are other newspapers published in the Muskogee area on which I do not have the circulation figures. However, to my knowledge and belief, in several instances the circulations are substantial.

66 The facts herein set forth are within my own personal knowledge. As to the statements herein made upon information and belief, I believe them to be true.

This affidavit is made for use in the above entitled case.

PAUL J. SCHAEFER,
Circulation Mngr.

Subscribed and Sworn To before me this 3rd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal)

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Exhibit D.

Affidavit of Paul J. Schaefer.

State of Oklahoma, County of Muskogee, ss.

67 Paul J. Schaefer, being duly sworn, deposes and says:

I am a resident of the County of Muskogee and State of Oklahoma. For a period of 17 years last past I have been continuously and am now, Circulation Manager of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, the two newspapers published at Muskogee, Oklahoma, by the Oklahoma Press Publishing Company, a corporation organized under the laws of the State of Oklahoma.

During said period I have been and am now thoroughly familiar with the circulation department of said newspapers and the operation of this department, and with the circulation and distribution of said newspapers. For the twelve months ending September 30, 1943, as audited by the Audit Bureau of Circulations, the entire total net paid circulation of the Muskogee Daily Phoenix was 12,172 copies, and the entire total net paid circulation of the Muskogee Times-Democrat was 9,491 copies.

Since June 1, 1939, no newspapers have been sold by either the Muskogee Daily Phoenix or the Muskogee Times-Democrat to persons living without the State of Oklahoma. Hence no copies of the aforesaid circulations were sold outside the State of Oklahoma during the said twelve
68 months period.

During this same said twelve months period a daily average total of 9,120 copies of the Muskogee Daily Phoenix, and 6,748 copies of the Muskogee Times-Democrat were distributed entirely within the County of Muskogee in the State of Oklahoma, in the cities, towns and villages all within the County of Muskogee, as follows:

| Towns | Muskogee Daily Phoenix | Muskogee Times-Democrat |
|---|---|---|
| Boynton | 128 | 73 |
| Braggs | 53 | 66 |
| Camp Gruber | 746 | 999 |
| Council Hill | 79 | 29 |
| Ft. Gibson | 118 | 25 |
| Haskell | 217 | 142 |
| Keefeton | 9 | 30 |
| Muskogee, City | 6,976 | 4,932 |
| Muskogee, R.F.D. | 346 | 41 |
| Oktaha | 81 | 68 |
| Porum | 108 | 116 |
| Taft | 24 | 27 |
| Wainwright | 24 | 1 |
| Warner | 62 | 80 |
| Webbers Falls | 136 | 78 |
| Balance in County (no Township | 13 | 41 |
| Total | 9,120 | 6,748 |

The breakdown of figures listed above is for the publication date of September 30, 1943, which was the date selected by the Audit Bureau of Circulations as being a typical average day and there would be but a slight variation of this figure over a year period.

That since June 1, 1939, none of Respondent's circulation in either of said newspapers has been sent or distributed outside the State of Oklahoma, except that approximately 120 copies of the Muskogee Daily Phoenix and approximately 17 copies of the Muskogee Times-Democrat during the past two years have been mailed daily to former Muskogee residents and citizens who are serving in the armed forces of the United States, both in this country and abroad, for

which papers so mailed no charge is made and no compensation of any character is received, and except that Respondent has mailed daily to its out of state representative
69 copies of the papers for its foreign advertisers, for which papers so mailed no charge is made and no compensation is received. That in rare instances copies of said papers are mailed direct to foreign advertisers upon their request, but no compensation is charged or received for such copies.

The following is a list of several weekly newspapers published in the immediate distribution area of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, which are competitive with our two newspapers, together with, upon information and belief, the circulation of said weekly newspapers which I have been able to ascertain. No circulation figures are published by the said newspapers and I have been able to procure only the circulation of those newspapers opposite whose names the figures appear:

| Name of Paper | Circulation |
|---|---|
| Boynton Index | 522 |
| Eufaula Indian Journal | 1,131 |
| Ft. Gibson Independent | 650 |
| Haskell News | 1,000 |
| Henryetta Free-Lance | 2,963 |
| Sallisaw County Times | 1,626 |
| Stigler News-Sentinel | 1,395 |
| Stilwell Democrat-Journal | 1,900 |
| Tahlequah Citizen | 990 |
| Wagoner-Record-Democrat | 1,640 |

Besides the foregoing circulation figures, according to the Audit Bureau of Circulations statement for twelve months ending December 31, 1942, the Tulsa World has a paid circulation of a total of 817 copies per day, and the Tulsa Tribune has a paid circulation of 458 copies per day, in the City of Muskogee.

Likewise, for the twelve months ending September 30, 1942, The Daily Oklahoman published in Oklahoma City, has a paid circulation of 210 copies per day, and the Oklahoma City Times, published in Oklahoma City, has a paid circulation of 126 copies per day in the City of Muskogee.

70 There are other newspapers published in the Muskogee area on which I do not have the circulation figures, but to my knowledge and belief, in several instances the circulations are substantial.

The facts herein set forth are within my own personal knowledge. As to the statements herein made upon information and belief, I believe them to be true.

This affidavit is made for use in the above entitled case.

PAUL J. SCHAEFER,
Circulation Mngr.

Subscribed and Sworn To before me this 3rd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal)

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## Exhibit E.

### Affidavit of Paul A. Bruner.

State of Oklahoma, Muskogee County, ss.

71 Paul A. Bruner, being first duly sworn, upon oath states that he is the Managing Editor of The Muskogee Daily Phoenix and The Muskogee Times-Democrat, owned by the Oklahoma Press Publishing Company, a corporation, and published at Muskogee, Oklahoma, and that he has been such Managing Editor of said newspapers at all times since July 5, 1930.

That as such Managing Editor affiant has supervision of the reporters on each of said papers, and has general supervision of the preparation of the news published in each of said papers, and is familiar with the manner of procuring, producing and preparing for publication the news articles published in said papers, including both local and foreign news.

That the news received from outside the State of Oklahoma and published in said newspapers is and has been received over telegraphic wires running into the building of the Oklahoma Press Publishing Company at Muskogee, Oklahoma, where said papers are printed and published. That said wires are connected with automatic teletype ma-

chines which receive and automatically record in type similar to that of a typewriter the news so received by said papers. That no person in the employ of the Oklahoma Press Publishing Company is required to operate said teletype machines in the receipt of said news from outside the State of Oklahoma. That mechanics are employed to maintain said machines in working condition.

72 That each of said newspapers employs a telegraph editor, and sometimes an assistant telegraph editor; that they periodically tear off from said automatic teletype machines the printed matter received thereon, which is examined by the editors and/or this affiant. That said editors or this affiant select therefrom such portions thereof as are desired to be and are published in said newspapers. That said foreign news so received over said teletype machines is edited by the said editors or this affiant, and headings are written for such portions thereof as are published in said papers. That in editing said articles for publication in said newspapers portions thereof are frequently stricken and sentences and paragraphs deleted, and in some rare instances sentences and paragraphs are rewritten, but the sense and substance thereof is never changed. That half or more of such foreign news which comes over said teletype machines is rejected and not used in any form by either of said papers.

Affiant states that the facts herein set forth are within his own personal knowledge.

This affidavit is made for use in the above entitled case.

PAUL A. BRUNER.

Subscribed and Sworn to before me this 2nd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal).

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Exhibit F.

Affidavit of Franklin E. Katterjohn.

State of Oklahoma, Muskogee County, ss.

73 Franklin E. Katterjohn, being first duly sworn, upon oath states that he is the Business Manager of

The Muskogee Daily Phoenix and The Muskogee Times-Democrat, newspapers printed and published by the Oklahoma Press Publishing Company, a corporation, at Muskogee, Oklahoma, and that he has been such Business Manager at all times since the 17th day of March, 1941.

That the out of state advertisements printed in said newspapers since said date have been and are received through the United States mails from their out of state advertising representative and from their foreign advertisers. That the major portion of such out of state advertising is received in the form of mats and electrotype plates.

That the cost for said out of state advertising is paid to the newspapers by said out of state advertising representative, less commission, and said foreign representative in turn collects from the individual foreign advertisers. As to whether or not said foreign representative collects in full from all of said foreign advertisers this affiant has no knowledge, and said newspapers have no concern.

74 Affiant states that the facts herein set forth are within his own personal knowledge. Upon information and belief affiant states that said foreign advertisements have been handled in the manner herein set forth at all times since the 1st day of June, 1938.

This affidavit is made for use in the above entitled case.

FRANKLIN E. KATTERJOHN.

Subscribed and Sworn to before me this 2nd day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal).

Filed March 7, 1944. John H. Pugh, Clerk, U. S. District Court. By W P W Deputy Clerk.

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## Order.

75 On this 9th day of March, 1944, this cause comes on for hearing in its regular order, the applicant, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appearing by his attorneys Earl Street and Harry Campbell, Jr., and the

respondent, Oklahoma Press Publishing Company, a corporation, appearing by its attorney, Chas. A. Moon.

The respondent thereupon asks leave to file an amendment to its Response, which amendment consists of an affidavit of Paul J. Schaefer, to be marked Exhibit "G" to the Response filed herein. This request is granted, and said amendment, consisting of said affidavit, is filed in open court.

The applicant asks leave to file the affidavit of Harry Campbell, Jr., which request is granted, and said affidavit is filed in open court.

Both parties then announce ready for hearing, and the applicant stated that he did not desire to offer any oral evidence or evidence other than the verified application and the affidavit of the said Harry J. Campbell, and the Respondent stated that it desired to offer no oral evidence, but submitted the cause upon its verified Response and the affidavits filed as exhibits thereto.

76 The Court thereupon heard argument of counsel, and after the hearing of such argument directed Charles Diffendaffer, the Court Reporter who had reported all of the argument, to transcribe the same and file such transcript with the Court, and directed that the cost of such transcript be divided equally between the parties.

The Court then took said cause under advisement and informed counsel that they would be given notice of the time when judgment would be entered herein.

It Is Therefore Ordered and Decreed that said cause be and the same is hereby submitted for judgment and is by the Court taken under advisement.

EUGENE RICE, Judge.

O.K. as to form:

.....

EARL STREET,
Attorneys for Applicant.
CHAS. A. MOON,
Attorney for Respondent.

Filed March 9, 1944. John H. Pugh, Clerk, U. S. District Court.

Amendment to Response.

77 Comes now the Respondent, and for Amendment to the Return to Order to Show Cause and Response to Application to Compel the Production of Documents and Records, filed herein by it on the 7th day of March, 1944, attaches hereto the affidavit of Paul J. Schaefer, dated March 9, 1944, as its Exhibit "G", and makes the same a part of its Response, and requests that it be read and considered as a part of said original Response filed herein.

Wherefore Respondent prays:

1. That the Order entered herein on January 29, 1944, requiring Respondent to appear before this Honorable Court to show cause, etc., be vacated, and

2. That this proceeding be dismissed.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Respondent.

Filed in Open Court March 9, 1944. John H. Pugh, Clerk, U. S. District Court.

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Exhibit G.

Affidavit.

State of Oklahoma, Muskogee County, ss.

78 Paul J. Schaefer, being duly sworn, deposes and says:

I am a resident of the County of Muskogee and State of Oklahoma. For a period of 17 years last past I have been continuously and am now Circulation Manager of the Muskogee Daily Phoenix and the Muskogee Times-Democrat, the two newspapers published at Muskogee, Oklahoma, by the Oklahoma Press Publishing Company, a corporation organized under the laws of the State of Oklahoma.

That during said period I have been and am now thoroughly familiar with the circulation department of said newspapers and the operation of said department, and with the circulation and distribution of said papers. That the approximate average number of copies of the Muskogee

Daily Phoenix mailed daily to Respondent's out of state representatives for its foreign advertisers is 36, and that the approximate average number of copies of the Muskogee Times-Democrat mailed daily to Respondent's out of state representatives for its foreign advertisers is 31. That for said copies so mailed no charge is made and no compensation is received.

PAUL J. SCHAEFER

Subscribed and Sworn to before me this 9th day of March, 1944. Freda Ungar, Notary Public. My commission expires: Dec. 13, 1947. (Seal).

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Affidavit.

State of Texas, County of Dallas, ss.

79 Harry Campbell, Jr., of lawful age, being first duly sworn, on oath says;

That he is one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, the petitioner herein; that he did prepare the subpoena duces tecum served on the respondent herein on January 31, 1944 in this affiant's office at Dallas, Texas on the 12th day of October, 1943, and did forward said subpoena duces tecum to the said L. Metcalfe Walling, Administrator, on the said date, that said subpoena at the time it was forwarded to the said L. Metcalfe Walling, Administrator, was complete except for the space for the signature of the said L. Metcalfe Walling, Administrator, and for the place and date the said signature was appended, that he is familiar with the signature of the said L. Metcalfe Walling and that the signature appended to the said subpoena duces tecum is his signature.

Further affiant saith not.

HARRY CAMPBELL, JR.

Subscribed and Sworn to Before Me This 8th Day of March 1944. E. F. Roberson—Notary Public. (Seal).

Filed March 9, 1944. John H. Pugh, Clerk, U. S. District Court.

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Findings of Fact and Conclusions of Law.

I.

80 The hearing herein was upon the Response of the Oklahoma Press Publishing Company, a corporation (hereinafter referred to as the Company) to an Order to Show Cause issued herein. The Order to Show Cause was issued upon the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor (hereinafter referred to as Administrator) proceeding under the Wage and Hour Act (hereinafter referred to as the Act), 29 U.S.C.A. 211(a), also Section 209 which makes applicable to such proceedings the procedure provided for in 15 U.S.C.A. 49-50.

II.

The proceedings leading up to the filing of the application are as follows: A representative of the Administrator requested of a representative of the Company the right to inspect and examine their books, papers and records for the purpose of determining whether or not the Company was complying with the Act. This request was refused. Whereupon, a subpoena duces tecum was issued by the Administrator, requiring the Company to appear at a designated place and time and to produce the following books, papers and documents: "all of your books, papers and documents showing the hours worked by and wages paid
81 to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards, and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods."

III.

The Company refused to respond to the subpoena duces tecum, taking at all times the position that is reflected by the Response filed herein. Briefly summarized, the position of the Company is that the Act is not applicable to newspapers, and if so, it is unconstitutional; that the Company

is not engaged in commerce or in the production of goods for commerce within the meaning of the Act; and that its employees are not engaged in commerce or in the production of goods for commerce.

IV.

No oral testimony was produced at the hearing. The cause was submitted to the court upon the affidavits of the respective parties. Essentially, there is no dispute as to the facts. The Company does not dispute the fact that the Administrator or his representative took the steps that are set forth and alleged in the Application for an Order to Show Cause. The Company admits that it refused to respond to the subpoena duces tecum. On the other hand, the Administrator admits, for the purpose of this hearing, that the Company conducts its business as set forth in the affidavits attached to its response.

V.

The essential facts in regard to the Company and the manner in which it conducts its business are as follows:

82 The Company is the owner of and publishes two newspapers in the City of Muskogee—one a morning paper, the Muskogee Daily Phoenix; the other an evening paper, the Muskogee Times-Democrat. The total net paid circulation of the Muskogee Daily Phoenix as of September, 1943, was 12,172. The total net paid circulation of the Muskogee Times-Democrat as of said date was 9,491. Of this circulation, 9,120 of the Muskogee Daily Phoenix, and 6,748 of the Muskogee Times-Democrat were in Muskogee County, Oklahoma. No other newspaper printed and circulated within Muskogee County, Oklahoma, or within the immediate territory of Muskogee County, Oklahoma, has a paid circulation in excess of 3,000. Since June 1, 1939, no papers have been sold by the Company to persons outside the State of Oklahoma, unless it might be said that the sending of papers to out-of-state advertisers constitutes a sale, although no sum is paid for the papers as such. The Company mailed, without charge, to former Muskogee residents in the armed forces approximately 120 copies of the Muskogee Daily Phoenix, and approximately 17 copies of the Muskogee Times-Democrat. The Company also mails to its out-of-state representative for advertisers a copy of

each paper for each foreign advertiser. The number of papers so sent is approximately 67 daily. The Company receives its news in the usual manner. Out-of-state news is received over telegraphic wires by means of an automatic teletype machine which requires no one to operate. The Company then selects that part of such news as is desired and publishes it, discarding the remainder. Its out-of-state ads are received through the United States mail, a large part thereof being in the form of mats and electrotype plates. The Company deals with an out-of-state representative in handling this out-of-state advertising. The advertisers pay the out-of-state representative, and the out-of-state representative in turn pays the Company, after deducting his commission. At the hearing, the Company admitted that much of its newspaper supplies, paper, machinery, etc., are purchased outside the State of Oklahoma.

VI.

83 The affidavits of the Respective parties are hereby made a part of the findings of fact by reference. It has been the purpose of the court to include in this statement the essential facts for decision herein. If any fact contained in the affidavits has been omitted it is hereby incorporated herein by reference and made a part hereof.

Conclusions of Law.

I.

Under the provisions of the Act, and under the facts admitted herein, the application of the Administrator to this court for an Order to Show Cause was proper, and this court has jurisdiction of the proceedings, and the Order to Show Cause was properly issued. Lowell Sun Co. v. Fleming, 120 Fed. 2d, 213.

II.

Since this cause was submitted, the Supreme Court of the United States has denied certiorari in Sun Publishing Co. v. Walling, Wage and Hour Administrator, (6th C.C.A.), 140 Fed. 2d, 445. That case, in the court's opinion, is decisive of every issue raised by the Company herein. The facts in that case are almost identical with the facts herein, with the exception that the newspaper involved in the Sun

Publishing Case had a small number of out-of-state subscribers, the number being approximately 200. The Sun Publishing Company, like the Company herein, sent copies of its paper to national advertisers. The only distinction in the two cases is the fact that the Sun Publishing
84 Company Case had 200 out-of-state paid subscribers; the Company herein has approximately 140 persons in the armed forces outside the state to whom it sends its papers complimentary. The fact that the papers are sent complimentary does not warrant a different conclusion as to applicability of the Act. See also, Associated Press v. National Labor *Relation* Board, 301 U. S. 103.

III.

Under the authority of the Sun Publishing Company Case, the court holds that the Company herein is subject to the Wage and Hour Act; that the Order to Show Cause issued herein was properly issued; that the Company has not shown cause why it should be relieved from complying therewith; and the Company is directed to comply with the subpoena duces tecum issued by the Administrator at a date to be fixed in the decree of this court.

IV.

The attorney for the Administrator is directed to prepare a proper decree in conformity with the views expressed herein, serve a copy thereof upon the attorney for the Company, and present to the court for entry at Muskogee on Monday, June 12, 1944, at 10 o'clock A. M.

EUGENE RICE, Judge.

Filed June 2, 1944. John H. Pugh, Clerk, U. S. District Court.

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Order.

85 Now, on this 12th day of June, 1944, the above-styled and numbered cause came duly on for hearing on the application of L. Metcalfe Walling, Administrator of the Wage and Hour Division of the United States Department of Labor, for an order of this Court requiring the pro-

duction of documentary evidence by the Oklahoma Press Publishing Company, a corporation, pursuant to subpoena, and the Administrator, aforesaid, appearing by his duly authorized counsel of record, Earl Street, and the said Oklahoma Press Publishing Company, a corporation, appearing by its duly authorized attorney of record, Charles A. Moon; and the Court having examined the said application and affidavits, attached thereto and in support thereof, and the response filed herein by the said Oklahoma Press Publishing Company, a corporation, and having heard the argument of counsel and being fully advised in the premises, finds that an order should be issued as prayed for;

It is, therefore, Ordered, Adjudged and Decreed that the said Oklahoma Press Publishing Company, a corporation, and its officers, agents, employees and attorneys and all other persons acting in its behalf and interest be, and they hereby are, directed to give full and complete access to the books and records prayed for in the subpoena served on them by the Administrator, above-named, as follows:

All books, papers and documents showing the hours worked by, and the wages paid to, each of the employees of the said Oklahoma Press Publishing Company engaged in the publication and distribution of the Muskogee Daily Phoenix and the Muskogee Times-Democrat between October 24, 1938, and the date hereof, including all pay roll ledgers, time sheets, time cards and time clock records, and all books, papers and documents showing the distribution of copies of the said Muskogee Daily Phoenix and the Muskogee Times-Democrat outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods,

and that such access be given until a full inspection thereof has been completed.

EUGENE RICE,
United States District Judge.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Notice of Appeal.

86 Notice is hereby given that the Oklahoma Press Publishing Company, a corporation, Respondent in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the order, judgment and decree entered herein on the 12th day of June, 1944.

Dated this 12th day of June, 1944.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Appellant.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

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Motion for Supersedeas.

87 Comes now the Oklahoma Press Publishing Company, a corporation, Respondent herein, and moves the Court to stay the enforcement of the order, judgment and decree entered herein on the 12th day of June, 1944, pending the disposition of Respondent's appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and for that purpose to fix the amount of the Supersedeas Bond required to be filed by the Respondent.

J. C. STONE,
CHAS. A. MOON,
Attorneys for Respondent.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

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Order Granting Supersedeas.

88 On this 12th day of June, 1944, this cause comes on to be heard on motion of the Oklahoma Press Publishing Company a corporation, Respondent herein, for a stay pending Respondent's Appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and it appearing to the Court that Respondent is entitled to such stay,

It Is Ordered That execution of any *any* proceedings to enforce the order, judgment and decree entered herein on the 12th day of June, 1944, be stayed, pending the determination of Respondent's appeal from such order, judgment and decree, upon the filing by Respondent and approval by this Court of a Bond in the sum of Five Hundred and 00/100 ($500.00) Dollars, said Bond to be filed within 10 days from this date.

EUGENE RICE, Judge.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

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Supersedeas Bond.

Know All Men By These Presents;

89 That we, Oklahoma Press Publishing Company, a corporation, as Principal, and Tams Bixby, Jr., and Franklin E. Katterjohn, as Sureties, are held and firmly bound unto L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, in the full and just sum of Five Hundred and 00/100 ($500.00) Dollars, to be paid to the said L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, his successors and assigns, for which payment well and truly to be made we bind *outselves*, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of June, 1944.

Whereas on the 12th day of June, 1944, a judgment and decree was entered in the above entitled cause by the United States District Court for the Eastern District of Oklahoma, against the Oklahoma Press Publishing Company, a corporation, from which judgment and decree said corporation has appealed to the United States Circuit Court of Appeals for the Tenth Circuit,

Now, the condition of this obligation is such that if the said Oklahoma Press Publishing Company, a corporation, shall prosecute its appeal to effect and shall satisfy the judg-

ment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the Circuit Court of Appeals may adjudge and award, and shall in all things abide the final judgment in this cause, then this obligation to be void; otherwise to remain in full force and effect.

OKLAHOMA PRESS PUBLISHING COMPANY,
By TAMS BIXBY, JR., President.
Principal.
TAMS BIXBY, JR.,
FRANKLIN E. KATTERJOHN,
(Seal) Sureties.

Attest:
HAZEL H. JOHNSON, Secretary.

Acknowledgment.

State of Oklahoma, Muskogee County, ss.

90 Before me, the undersigned, a Notary Public in and for said County and State, on this 12th day of June, 1944, personally appeared Tams Bixby, Jr. and Franklin E. Katterjohn to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

(Seal) LA MONA BLAIR, Notary Public.

My commission expires: April 5, 1947.

The foregoing Supersedeas Bond is hereby approved this 12th day of June, 1944.

EUGENE RICE, Judge.

Filed June 12, 1944. John H. Pugh, Clerk, U. S. District Court.

Designation of Contents of Record on Appeal.

91 Comes now the Oklahoma Press Publishing Company, a corporation, Respondent herein, and hereby designates the complete record and all the proceedings, evidence and admissions in this action, and requests that the same be included and contained in the record on appeal, including the following, to-wit:

(1) The application to compel the production of documents and records, filed in this Court on January 29, 1944;

(2) The Order to Show Cause, entered herein on January 29, 1944, and the United States Marshal's return thereon;

(3) The Respondent's Return to Order to Show Cause, and Response to Application to Compel the production of documents and records, together with all exhibits thereto attached;

(4) The Amendment to the Response filed by the Respondent, and the Affidavit of Paul J. Schaeffer thereto attached;

(5) The additional affidavit of the Applicant, filed March 9, 1944;

(6) The agreements and admissions made in open court on March 9, 1944;

(7) The Order of the Court, dated March 9, 1944;

(8) The Findings and Conclusions of the Court filed herein;

(9) The Judgment entered herein June 12, 1944;

(10) The Notice of Appeal filed June 12, 1944;

(11) The Motion for Supersedeas, filed June 12, 1944;

92 (12) The Order allowing Supersedeas and fixing Bond, entered June 12, 1944;

(13) The Supersedeas Bond filed and showing the approval thereof by the Judge on June 12, 1944;

(14) All other parts of the record necessary to make a

complete record and all the proceedings and evidence in the action.

CHAS. A. MOON,
Attorney for Oklahoma Press Publishing Company, a corporation.

Filed June 13, 1944. John H. Pugh, Clerk, U. S. District Court. By B. L., Deputy Clerk.

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Certificate of Clerk.

United States of America, Eastern District of Oklahoma, ss.

93 I, John H. Pugh, Clerk of the United States District Court in and for the Eastern District of Oklahoma, do hereby certify that the annexed and foregoing is a true and correct copy of the original pleadings and proceedings in civil action No. 1166; In the Matter of the Application of L. Metcalfe Walling, Administrator of the Wage and Hour Division; as is called for in the designation of the contents of the record filed herein, and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Muskogee, Oklahoma this 8th day of July, 1944.

JOHN H. PUGH, Clerk, U. S. District Court.
(Seal) By: RANDOLPH KIZZIRE, Deputy Clerk.

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Filed July 19, 1944. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of Submission.

Third Day, November Term, Wednesday, November 15th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel. Elisha Hanson, Esquire, and Charles A. Moon, Esquire, appearing for appellant, Douglas B. Maggs, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

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Opinion.

[February 15, 1945.]

Elisha Hanson (Joseph C. Stone and Charles A. Moon were with him on brief) for Appellant.

Douglas B. Maggs (Bessie Margolin, Llewellyn B. Duke and Flora G. Chudson were with him on brief) for Appellee.

Before Phillips, Bratton and Murrah, Circuit Judges.

Murrah, Circuit Judge, delivered the opinion of the court.

The primary question presented by this appeal is whether the Administrator of the Wage and Hour Division of the Fair Labor Standards Act (52 Stat. 1060, 29 USCA 201, et seq.) is entitled to an order of the District Court enforcing an investigatory subpoena, issued by the Administrator in pursuance of Section 9 of the Act, for the purposes enumerated in Section 11(a) thereof, without a prior adjudication by the court to the effect that the industry or activity sought to be investigated by the subpoena is subject to and covered by the provisions of the Fair Labor Standards Act, and if so, what considerations govern the court in the enforcement of the subpoena.

Section 11(a) of the Act authorizes the Administrator to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and [he] may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provisions of this Act". Section 11(c) requires every employer subject to any provision of the Act to make and keep records of wages, hours, and other conditions of employment and to make reports therefrom, as prescribed by regulations of the Administrator, "necessary or appropriate for the enforcement of the provisions of the Act".

When permission to "enter and inspect", as authorized by Section (11)(a) is denied to the Administrator or his subordinates, the Administrator is authorized by Section 9 of the Act (which adopts sections 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717, 15 USCA 41-49) to issue a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relevant to any matter under investigation authorized by Section 11(a), at any designated place of hearing. In the event of disobedience to the subpoena, the Administrator may invoke the aid of any court of the United States having jurisdiction of the subpoenaed party, and such court may issue an order requiring the recalcitrant witness to obey the subpoena. Failure to obey such order of the court is punishable as a contempt thereof.

After being denied permission to examine the books and records of the appellant, Oklahoma Press Publishing Company, under Section 11(a) of the Act, the Administrator issued a subpoena duces tecum, directed to the appellant, requesting the production of "books, papers, and documents showing the hours worked by, and wages paid to, each of your employees between October 29, 1938, and the date hereof, including all payroll ledgers, time sheets and cards, and time clock records, and all your books, papers and documents showing the distribution of papers, out of the state of Oklahoma, the dissemination of news outside of the state

of Oklahoma, and the source and receipt of advertisements of nationally advertised goods". Acting upon the belief that neither it nor its employees were "subject to the Act", appellant refused to obey the subpoena, whereupon the Administrator applied to the District Court for an order compelling obedience as authorized in Section 9.

The application alleged on information and belief, that the appellant, as publisher of two daily newspapers, was engaged in commerce or in the production of goods for commerce within the meaning of the Act, and that all the books, records, papers and documents referred to in the subpoena were "relative, material, and appropriate" to determine whether the company had violated the Act, and would "aid in the enforcement of the provisions of the Act". By answer to the show cause order, appellant alleged that neither it nor any of its employees were engaged in commerce or in the production of goods for commerce; that a forced investigation would be an unreasonable search and seizure, and moreover, any attempted regulation of its business violated the freedom of the press. In the alternative, it was alleged that if appellant or any of its employees are engaged in commerce or in the production of goods for commerce, as a newspaper publisher, it is a service establishment as defined by Section 13(a)(2) of the Act and therefore exempt from its coverage.

The application for the enforcement order was submitted to the trial court upon the foregoing pleadings and accompanying affidavits. Upon the facts thus established and on authority of Sun Publishing Company v. Walling, 140 F. 2d 445, the trial court adjudged the appellant "subject to the Wage and Hour Act", and upon this premise ordered appellant to comply with the subpoena.

On appeal appellant makes the contention that compulsory obedience to the investigatory subpoena constitutes an unreasonable search and seizure, unless the court first adjudicates the question of coverage, and that the summary proceedings pursuant to which the trial court ordered obedience to the subpoena did not afford it an opportunity to have the question of coverage determined in a full and complete proceedings conducted for that purpose. In other

words, it is argued that the appellant may bar the investigator at the threshold until it is conclusively shown that the matters and things sought to be investigated by the subpoena are within the scope of the Act, which authorizes its issuance. Relying upon Endicott-Johnson v. Perkins, 317 U. S. 501, the Administrator makes the contention that he is entitled, as of right, to an order of enforcement upon the bare allegations contained in his application for the order, without any further showing of coverage—that any less expeditious assistance would greatly hinder the effectuation of the purposes of the Act. It is further urged that in any event, the showing made in the summary proceedings was entirely sufficient to justify the order of enforcement.

In order to effectuate the purposes of the Act, the Administrator is authorized to "enter", "inspect" and "investigate", and when denied permission he may issue a subpoena requiring the appearance and testimony of witnesses, and the production of the documentary evidence sought to be inspected, but the Administrator has no power to compel obedience to the subpoena—such powers have historically resided in the courts as an appropriate exercise of a judicial function.[1] Interstate Commerce Commission v. Brimson, 154 U. S. 447. Like most acts of similar import (see footnote 1), Section 9 which confers jurisdiction, provides that the court "may . . . issue an order requiring" obedience to the subpoena.[2] "The language is not mandatory but permissive". Mississippi Road Supply v. Walling, 136 F. 2d 391. It clearly envisages a judicial act, and in the clas-

[1] The following acts of Congress creating administrative agencies and tribunals with subpoena power specifically delegate to the courts the power to enforce the subpoenas. Interstate Commerce Act, 41 Stat. 484 (49 USCA 12(3)); Federal Power Act, 49 Stat. 863 (16 USCA 825f(c)); Merchant Marine Act, 52 Stat. 954 (46 USCA 1124(b)); Veterans Administration Act, 49 Stat. 2033 (38 USCA 133); Walsh-Healey Act, 49 Stat. 1921 (41 USCA 39); Railroad Unemployment Ins. Act, 54 Stat. 199 (45 USCA 362(b)); Securities Act of 1933, 49 Stat. 1921 (15 USCA 77v(b)); Securities Exchange Act of 1934, 49 Stat. 1921 (15 USCA 77u(b)); Public Utility Holding Co. Act, 49 Stat. (15 USCA 79r(d)); National Labor Relations Act, 49 Stat. 1921 (29 USCA 161(2)). See also the Enforcement of Administrative Subpoenas, 44 Columbia Law Review, July 1944, p. 531.

[2] With the exception of the National Labor Relations Act and the Walsh-Healey Act, which merely confer jurisdiction upon the courts to issue an order requiring obedience to the subpoena, and the Railroad Unemployment Insurance Act, which provides that the court "shall" issue an order compelling obedience to the subpoena. See footnote 1.

sical words of Judge Johnsen of the 8th Circuit, "judicial enforcement is necessarily the exercise of judicial power and judicial function can never wholly escape the test of judicial responsibility". Walling v. Benson, 137 F. 2d 501.

Endicott-Johnson v. Perkins, supra, involved the relationship of the courts to the subpoena power of the Secretary of Labor under Section 4 of the Walsh-Healey Public Contracts Act. The Circuit Court of Appeals (128 F. 2d 208), and the Supreme Court (317 U. S. 501), held that in the circumstances, the District Court should have enforced the subpoena, but we do not understand that in so holding it intended to sweep away all power of judicial discretion. In reaching its decision, the court noted that the Walsh-Healey Act had peculiar application to those doing business by voluntary contract with the United States Government; that under its provisions the issue of coverage was primarily the duty of the Secretary of Labor and not the courts, and that since the evidence sought by the subpoena was not plainly incompetent or irrelevant to the discharge of that lawful function, it was the duty of the court to order the production of the records sought by the subpoena. Unlike the Walsh-Healey Act, the ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts and not to the Administrator. We do not think that the philosophy of Endicott-Johnson v. Perkins, supra, is authority for the contention of the Administrator to the effect that the courts are deprived of the power of discretion in the performance of the judicial function expressly committed to them and denied to the Administrator.

It is, of course, fundamental that any invasion or intrusion upon the privacy of an individual's business or home must have the sanction of both constitutional and legislative authority, and any process issued for that purpose must confine its requirements within the limits which reason would impose under the circumstances of the case. Bowles v. Beatrice Creamery Co., 10th Cir., . . . F. 2d . . .; Shotkin v. Nelson, 10th Cir., . . . F. 2d . . . .; McGarry v. Securities and Exchange Commission, . . . F. 2d . . .; Fleming v. Montgomery Ward & Co., 7th Cir., 114 F. 2d 384; Wilson v. United States, 221 U. S. 361; Essgee Co. v. United States, 262 U. S. 151; Federal Trade Commission v. American

Tobacco Co., 264 U. S. 298. See also Cooley's Constitutional Limitations, page 610.

In delineating the proper functions of the courts in the exercise of their jurisdiction to enforce subpoenas in aid of investigatory powers of administrative agencies, the courts as well as Congress have recognized the duty to guard against the evils which inevitably spring from the injudicious exercise of the power to issue an investigatory subpoena. See Interstate Commerce Commission v. Brimson, 154 U. S. 447; Boyd v. United States, 116 U. S. 616; Hale v. Henkel, 201 U. S. 43; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298; Cudahy Packing Co. v. Holland, 315 U. S. 357. It is said that constitutional provisions prohibiting unreasonable search and seizure "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers". Gouled v. United States, 255 U. S. 298, 304. But they must be construed so as to serve the public interest as well as individual rights. Carroll v. United States, 267 U. S. 132. Especially is this true where, as here, the law regulates that which it seeks to investigate. Wilson v. United States, 221 U. S. 361, 384; Fleming v. Montgomery Ward & Co., 114 F. 2d 384; Rodgers v. United States, 138 F. 2d 992. To again borrow the language of Judge Johnsen in Walling v. Benson, supra, "In a field of declared public interest—such as the Fair Labor Standards Act clearly is—the courts must give full, facilitating co-operation to the exercise of authorized administrative powers and duties, if no possible threat to fundamental rights and concepts is involved. But, in their desire to measure up to this obligation, they must not sweep aside the fundamental and inherent concept that a judicial responsibility is owing for any judicial function that they are called upon to perform—a responsibility that necessarily must soundly cover (but not attempt to extend beyond) the scope of the required function."

An officer of the law is entitled to invade the privacy of one's home on the authority of a warrant issued by a magis-

trate upon an affidavit of probable cause, and the person whose home is searched is afforded no opportunity to be heard concerning the validity of the warrant or the unreasonableness of the search until after it has been made, and he is called upon to answer for a criminal offense based thereon. See Gouled v. United States, 255 U. S. 298; Dumbra v. United States, 268 U. S. 435. Surely it is not argued that the right of a person to be secure in his business from an unreasonable investigation under an administrative subpoena is greater or more sacred than the right of a person to be secure from unreasonable search and seizure in the privacy of his home. The rule of probable cause has always been deemed an adequate safeguard against unreasonable search and seizure and we think the measure of protection it affords fulfills the spirit of the constitutional guaranty in civil cases of this kind.

When judged by this test, it is plain that the appellant is not entitled to an adjudication of actual coverage as a prerequisite to the enforcement of the subpoena, rather the orderly and efficient enforcement of the Act within the framework of the constitutional rights of the parties involved, require only that the District Court have "the assurance that it is not giving judicial sanction and force to unwarranted and arbitrary action, but that reasonable grounds exist for making the investigation". Walling v. Benson, 137 F. 2d 501.[3] In judicially determining whether an investigation sought by an administrative subpoena is constitutionally reasonable, it is essential to consider whether the testimony and the data sought to be produced are pertinent to an inquiry which the Administrator is authorized by law to conduct in order to perform the functions imposed upon him by the Act. Shotkin v. Nelson, 10th Cir., . . . F. 2d . . .; McGarry v. Securities and Exchange Commission, 10th Cir., . . . F. 2d . . .

The Administrator is statutorily charged with the primary duty of enforcing the wage and hour provisions of the Fair Labor Standards Act, and to that end he is authorized by Section 11(a) to investigate and gather data regarding

[3] In arriving at this conclusion we are not unmindful of the contra view expressed in General Tobacco and Grocery Co. v. Fleming, 125 F. 2d 596, 140 A.L.R. 783.

the "wages, hours, and other conditions and practices of employment in any industry subject to the Act". This particular prerogative is addressed to an industry as a whole and presupposes that the industry is "subject to the Act", but the Administrator is also empowered to enter, inspect and investigate such conditions, practices or matters which he may deem necessary or appropriate to determine whether any person has violated the Act, or to conduct any investigations which may aid in the enforcement of the provisions of the Act. Walling v. Standard Dredging Corp., 44 F. Supp. 601, affirmed 132 F. 2d 918; Walling v. American Rolbal Corp., 135 F. 2d 1003. This phase of the investigatory powers does not presuppose coverage, but is to enable the Administrator to determine whether any employer or employee is subject to the Act, and if the Act has been violated.

The subpoena in this case sought to compel the production of data in respect to the hours worked and wages paid to appellant's employees which is relevant to the question whether any provision of the Act had been violated. The subpoena also sought the production of data pertaining to the interstate activities of the appellant, which obviously relate to the question whether it or any of its employees is engaged in commerce or in the production of goods for commerce, and are therefore subject to the Act. To hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act.

The application for the enforcement order alleged that upon information and belief the appellant was subject to the Act and that it was violating the wage and hour provisions thereof. By the subpoena the Administrator purposed to obtain data which upon the issue of coverage and violations would ultimately be judicially determined. When the matter was submitted to the trial court on the rule to show cause, it concluded coverage, but it did not have to go that far. It was sufficient if the application and accompanying affidavits furnished reasonable grounds for the belief that appellant or any of its employees were subject to the Act. In these circumstances it became the inescapable duty

of the court to compel obedience to the subpoena. The ultimate question of coverage or violations was not presented on the record before the trial court, nor is it presented or decided here. It is time enough to consider that question when all the evidence sought to be produced by the subpoena is before the court in a proceeding directly involving violations based on coverage.

"The publisher of a newspaper has no special immunity from the application of general laws," Associated Press v. Labor Board, 301 U. S. 103, including the Fair Labor Standards Act, Sun Publishing Company v. Walling, 140 F. 2d 445, and uniform regulations imposed upon those covered by the Fair Labor Standards Act are not an abridgement of the freedom of the press.

The judgment is AFFIRMED.

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Judgment.

Forty-eighth Day, November Term, Thursday, February 15th, A. D. 1945, Before Honorable Orie L., Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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Order Staying Mandate.

Fifty-fifth Day, November Term, Monday, February 26th, A. D. 1945. Before Honorable Orie L. Phillips, Circuit Judge.

This cause came on to be heard on the motion of appellant for a stay of the mandate herein to and including April 25, 1945.

On consideration whereof, it is now here ordered that

said motion be and the same is hereby granted and that no mandate of this court issue herein on or before April 25, 1945, and that, if within said period of time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

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Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the District Court of the United States for the Eastern District of Oklahoma, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3036, wherein Oklahoma Press Publishing Company, a corporation, was appellant, and L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 20th day of March, A. D. 1945.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9605)